

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

IN RE ADOPTION OF:

AMH, a Minor,

JERRY L. BAKER and wife,

LOUISE K. BAKER,

Petitioners,

No. CH-01-1302-3

v.

SHAIO-QIANG (JACK) HE and

QIN (CASEY) LUO (HE),

Respondents.

**MEMORANDUM OPINION and ORDER OF JUDGMENT
ON PETITION TO TERMINATE PARENTAL RIGHTS
and PETITION TO MODIFY CUSTODY**

This cause came on to be heard for trial on February 23, 2004, upon a Petition for Adoption and To Terminate Parental Rights, filed by Jerry L. Baker and wife, Louise K. Baker ("the Bakers"), Petitioners, on June 20, 2001, and also upon a Petition to Modify the June 4, 1999, Consent Order Awarding Custody, filed by Qin Luo (He), Petitioner, in the Juvenile Court of Memphis and Shelby County, Tennessee, on May 29, 2001. After a careful review of the testimony of each of the witnesses, the trial exhibits, relevant statutory provisions and case law, arguments of the respective counsel for the parties and the guardian *ad litem*, and the entire record in this cause, the Court hereby grants the Petition to Terminate Parental Rights, filed by the Bakers, and terminates the parental rights of Shaio-Qiang (Jack) He and Qin (Casey) Luo He ("the Hes"). The Court also

denies the Petition to Modify Custody, filed by Qin Luo (He). Specifically, this Court finds that (1) the Hes willfully abandoned AMH for a period exceeding four (4) months, (2) the Hes provided no support for a period exceeding four (4) months, (3) the Hes only sought custody of AMH to prevent the Hes' deportation, and (4) it would be in AMH's best interest to terminate the Hes' parental rights and to remain with the Bakers. The Court will hold the Bakers' Petition For Adoption in abeyance until the Court's decision on the Petition to Terminate Parental Rights and the Petition to Modify Custody is final.

The Petition to Modify was transferred to this Court pursuant to *Tennessee Code Annotated* § 36-1-116(f)(1). The Court heard testimony from twenty-eight (28) witnesses, from February 23, 2004, until March 2, 2004. The following witnesses testified during the trial: Julie Mize, Michael Lowry, Brandy Hope Baker, Nancy Diane Thorn, Qin (Casey) Luo (He), Rebecca Smith, Louise Baker, Jerry Leonard Baker, Jr., Dr. Yih-Jia Chang, Diane Chunn Brower, Kevin Weaver, Sarah Cloud, Candace Brown, Elizabeth McCord Marshall, William Webb, Dr. John Copper, Shaio-Qiang (Jack) He, Kenny Yao, Dr. John Robert Hutson, Dr. John Victor Ciocca, John Astor, Larry Parrish, Catherine Claymon, John D. Walt, Kathryn E. Story, Kimbrough Mullins, guardian *ad litem*, Stephanie Johnson, and Dr. David Bruce Goldstein. The Court heard arguments of counsel for the parties regarding several pending motions on March 22-23, 2004, and heard closing arguments of counsel for the parties on April 12, 2004. The Court has made a careful review of the testimony of each of the witnesses, the seventy-nine (79) trial exhibits, relevant statutory provisions, and case law. The Court carefully observed the demeanor of each of the witnesses who testified. The Court has also reviewed the pleadings and the entire record in this cause.

Tennessee Code Annotated § 36-1-113(k) requires the Court to enter an order which makes specific findings of fact and conclusions of law. Termination of parental rights requires clear and convincing proof of one of the statutory grounds for termination and a finding that termination is in the best interest of the child. Clear and convincing evidence eliminates serious doubt¹ and produces a firm belief or conviction as to the truth of the allegations.² The Court is mindful of the great deference that must be given to the constitutionally protected rights of biological parents. Parents, including parents of children born out of wedlock, have a fundamental liberty interest in the care and custody of their child under both the United States and the Tennessee Constitutions. The right to rear one's child is so firmly rooted in our culture that the United States Supreme Court has held it to be a fundamental liberty interest protected by the Fourteenth Amendment of the United States Constitution.³

The Tennessee Adoption Law is set out in *Tennessee Code Annotated* § 36-1-101 *et seq.* The primary purpose of the adoption law is to provide means and procedures for the adoption of children that recognize and effectuate, to the greatest extent possible, the rights and interests of persons affected by adoption, especially those of the adopted persons, which are specifically protected by the United States and the Tennessee Constitutions. To those ends the adoption law seeks to ensure, to the greatest extent possible, among other things, that:

¹*Hodges v. S. C. Toof Co.*, 833 S.W.2d 896 (Tenn. 1992).

²*O'Daniel v. Messier*, 905 S.W.2d 182 (Tenn. Ct. App. 1995); *Wiltcher v. Bradley*, 708 S.W.2d 407 (Tenn. Ct. App. 1985), *perm. app. denied*, (March 3, 1986).

³U.S. Const., Am. 14, § 5; TN Const., Art. 1, § 8; *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993), citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); Dawn Coppock, *Coppock on Tennessee Adoption Law*, (Matthew Bender, 2003), at 46.

(1) Children are removed from the homes of their parents or guardians only when that becomes the only alternative which is consistent with the best interest of the child.

(2) Children are placed only with those persons who have been determined to be capable of providing proper care and a loving home for an adopted child.

(3) The rights of children to be raised in loving homes which are capable of providing proper care for adopted children and that the best interests of children in the adoptive process are protected.

(4) The adoptive process protects the rights of all persons who are affected by that process and who should be entitled to notice of the proceedings for the adoption of a child.

The secondary purpose of the adoption law is, among other things, to protect biological parents and guardians of children from decisions concerning relinquishment of their parental or guardian's rights to their children or wards which might be made as a result of undue influence or fraud.

Based on the witnesses' testimony, the trial exhibits, the arguments of the attorneys for the respective parties and the guardian *ad litem*, the relevant statutory and case law, and the entire record in this cause, the Court makes the following specific Findings of Fact and Conclusions of Law:

I. GENERALLY SIGNIFICANT FACTS

1. Mr. Baker was born September 29, 1958, in Memphis, Tennessee.
2. Mrs. Baker was born July 24, 1961, in North Carolina.
3. Mr. and Mrs. Baker have been married to each other and living together since July 12, 1982.
4. Mr. and Mrs. Baker have four (4) natural born children: two are college age, one is a teenager and one is age four.

5. Mr. and Mrs. Baker have continuously been resident citizens of Shelby County, Tennessee, since February 27, 1993.
6. Mr. Baker was employed by Pinnfund USA, as a mortgage banker, from approximately 1996 to 2001, and earned approximately \$435,000.00 during the last year he was employed by Pinnfund. Mr. Baker is a high school graduate and attended college.
7. Since leaving his employment at Pinnfund, Mr. Baker has earned an annual income ranging from approximately \$80,000 to \$125,000. His earning capacity has been adversely affected by having to locate new employment, since Pinnfund closed; by having to start over and work his way up through the ranks with a new employer; and by his inability to work at an employment that involves travel because of his concerns and involvement with this cause.
8. Mrs. Baker has been a housewife and mother during the Bakers' marriage and earns a small amount of income by doing babysitting in the Bakers' home. Mrs. Baker has a high school education.
9. Mr. He was born July 18, 1964, in the Peoples Republic of China and has been a citizen of that country since that time.
10. Mr. He first entered the United States from China on a student visa in March 1995, and has continuously resided in the United States since that date, except for a trip to the Peoples Republic of China in May 1998, returning in June 1998.
11. Mr. He received a Masters degree in teaching English as a second language from Hunan University in the Peoples Republic of China in 1988. He taught English at Nanjing University in the Peoples Republic of China from 1988 until 1995 when he came to the

United States to further his education. He has been qualified to teach English as a second language to persons who do not speak English since entering the United States in March 1995. He pursued a Masters degree in English as a second language at Arizona State University from 1995 to 1997. He finished his course work for the Masters degree, but he did not have the opportunity to defend his thesis and obtain his degree because he came to the University of Memphis in August 1997. He enrolled at the University of Memphis in August 1997 to pursue a Doctor of Philosophy degree in economics. He did not finish his course work for his Ph.D in economics because he switched his course of study to obtain a Masters degree in Management Information Systems at the University of Memphis. He finished his course for his Masters degree in Management Information Systems in 1998, but he did not receive his degree.

12. Mrs. He was born on March 21, 1968, in the People's Republic of China and has been a citizen of that country since that time. She entered the United States on June 28, 1998, and she has resided in the United States since that date.
13. Mrs. He does not speak or understand English proficiently and was provided qualified translators of her choice throughout the proceedings in this cause. At times during the trial Mr. He acted as Mrs. He's translator, by agreement of Mrs. He. Mrs. He remained aware of what transpired during the trial from those translators.
14. On June 28, 1998, Mrs. He was allowed entry into the United States on a F-2 visa, as the wife of a student on a F-1 student visa. Because she and Mr. He falsely represented to the United States Government that they were married to each other in the Peoples Republic of China, she has been in this country illegally.

15. Since September 1999, both Mr. and Mrs. He have had no legal right to remain in the United States and have been subject to deportation from the United States to the Peoples Republic of China.
16. Although both of the Hes have been employed and have earned income while in the United States, neither of the Hes can earn income legally while remaining in the United States because of their immigration status as illegal aliens.
17. Mr. He was arrested for sexual assault on April 27, 1999.
18. Mr. He was acquitted of the sexual assault charge in February 2003.
19. AMH was born out of wedlock on January 28, 1999, and AMH's birth parents are Shaio-Qiang (Jack) He and Qin (Casey) Luo.
20. Mr. He questioned whether he was the biological father of AMH and requested that the guardian *ad litem* arrange blood testing for Mr. He, Mrs. He, and AMH to determine paternity of AMH.
21. Mr. He filed an acknowledgment of paternity on March 15, 2002.
22. Shaio-Qiang He and Qin Luo were legally married in Memphis, Shelby County, Tennessee, on January 7, 2002.
23. By virtue of being born in the United States, AMH is a citizen of the United States.
24. AMH has resided in Shelby County, Tennessee, since AMH's birth on January 28, 1999.
25. AMH is a normal, healthy five-year-old child.
26. The Bakers have had legal custody and guardianship of the person of AMH continuously since June 4, 1999. On June 4, 1999, the Hes filed a petition to transfer custody of AMH to

the Bakers and signed a Consent Order Awarding Custody, which was entered by the Juvenile Court of Memphis and Shelby County, Tennessee.

27. The Consent Order Awarding Custody mandated the Bakers to be the legal custodians and guardians of the person of AMH and entitled the Bakers, as a matter of right, to the physical custody of AMH, the right to determine the nature of the care and treatment of AMH, including ordinary medical care, and the right and duty to provide for AMH's care, protection, training, and education, and AMH's physical, mental, and moral welfare.
28. Since June 4, 1999, the Bakers have undertaken and performed their duties and responsibilities as AMH's legal custodians and guardians.
29. All parties, including Mr. and Mrs. He, knowingly and voluntarily signed the June 4, 1999, Consent Order Awarding Custody, without being induced by any fraud or undue influence.
30. Attorney Kimbrough Mullins was appointed to act as guardian *ad litem* for AMH, by consent of both the Bakers and the Hes, by order dated July 24, 2001.
31. The Hes, the Bakers, and the guardian *ad litem* participated, by agreement, in mediation through the Christian Conciliation Service of the Second Presbyterian Church in 2002, but the mediation did not result in a resolution of this matter.

II. LITIGANT CREDIBILITY

The Court has carefully scrutinized the testimony of the Hes and the Bakers. Because they have an interest in the outcome of the case, the reliability of their testimony has been viewed in relation to other evidence and the entire record in this cause, for corroboration and/or inconsistency and the Court has weighed their testimony accordingly.

The Court observed Mr. Baker testify for approximately three (3) hours of live testimony at trial. Mrs. Baker testified for approximately five (5) hours of live testimony at trial. Mrs. He testified for approximately ten (10) hours of live testimony at trial. Mr. He testified for approximately seven (7) hours of live testimony at trial. The Court also observed Mr. He testify for approximately six (6) hours, by a video-tape deposition that was admitted as Trial Exhibit 20.

The Court was physically present with the Bakers and the Hes in the courtroom for over ninety-one (91) hours of trial testimony, over fifteen (15) hours of arguments on motions after the conclusion of the proof, and six (6) hours of closing arguments. The Court observed each of them throughout the trial proceedings and interacted, through counsel, with them as the trial proceeded to conclusion. The Court makes the following findings of fact regarding credibility of the witnesses:

32. Mr. Baker impressed the Court as a man who has a great deal of love, care, and concern for children in general, but who has an enormous amount of love, care, and concern for his own natural born children and for AMH. He testified in an honest, straightforward, sincere manner. Mr. Baker impressed the Court with his sincerity and the concern he expressed for AMH's welfare and safety. Mr. Baker has demonstrated concern for and a willingness to help others who are in need, including the Hes. As one example, Mr. Baker helped Mr. He when Mr. Hes' vehicle was in the shop for repairs.
33. Mrs. Baker impressed the Court as a sincere, honest, credible witness. She too has demonstrated that she has a great deal of love, care, and concern for children in general, but she also has an enormous amount of love, care, and concern for her own natural born children and for AMH. Mrs. Baker also impressed the Court with her care and concern for AMH's welfare and safety. Mrs. Baker has demonstrated concern for and a willingness to

help others who are in need, including the Hes. For example, she took Mrs. He to obtain social services and to apply for TennCare insurance coverage for the Hes' second child, Andy, who was born in October 2000. She took Mrs. He and Andy home from the hospital after Andy's birth. She loaned the Hes a baby bed for Andy. She went to the Hes' apartment to show Mrs. He how to feed, burp, bathe, and change Andy's diapers. She took Andy to the doctor's office because Mr. He was too busy, and she took Andy to other appointments because Mrs. He was too busy.

34. Both of the Bakers demonstrated their concern and care, and lack of any animosity toward the Hes, by foregoing their church and other regular activities to accommodate the Hes' visits with AMH. The Bakers also served the Hes dinner on several of their visits, and allowed the Hes to bring friends with them to the Bakers' home for visits, serving the friends dinner as well. On one occasion, the Bakers gave Mr. He a birthday card and a gift certificate to a restaurant for his birthday.
35. Mr. He is highly educated, both in the Peoples Republic of China and in the United States, and exhibits a high level of intelligence. He has demonstrated that he also has a high level of knowledge of the culture in the United States, that he is familiar with the justice system in Shelby County, Tennessee, and that he is proficient in his knowledge and use of the English language. He is proficient in computer skills, including the ability to access the Internet and to use website technology to garner resources and seek assistance from experts. He has an aggressive personality and shows no propensity to be deterred or intimidated. He is a thoughtful and deliberate person who exhibits a proclivity to calculate, plan, and carefully predetermine his action and behaviors. At all times relevant to this case,

Mr. He has demonstrated the ability to access knowledgeable advisors in any area in which he needs assistance, to scrutinize the advice given, and, if dissatisfied with the advice, reject the advice and seek out other advisors.

36. Since 1998, Mr. He has repeatedly engaged in a pattern of conduct marked by deceitfulness and dishonesty, without remorse, repentance, or conscience, and has shown a propensity to justify all means, including perjury, for what Mr. He deems to be justifiable ends.
37. Mr. He admitted that he lied about his income, under oath, in his December 20, 2001, deposition and that he said things that he knew were not the truth. During his deposition, Mr. He also knowingly and willfully gave false testimony with respect to material facts concerning his and Mrs. He's assets. The Court has previously found that Mr. He committed perjury while under oath in Court hearings and pleadings filed in this cause.
38. The Court reaffirms and incorporates herein by reference the findings made by the Court relative to the perjury of Mr. He in testimony given before the Court on February 14, 2002, as memorialized in the February 22, 2002, order entitled "Judgment On Order To Show Cause Pertaining To Passport" and the order entitled "Judgment On Order To Show Cause Pertaining To Documentation Of Marriage In The Republic Of China."
39. The evidence also shows that Mr. He tried to procure an F-2 visa, in 1997, for another Chinese woman, who Mr. He claimed was his wife. Mr. He later admitted that this woman was not his wife and that he had committed a fraud on the University of Memphis.

40. Mr. He made material false statements on a loan application, dated October 18, 2001, relative to his employment, his income, his status as a student, and his personal references for the purpose of securing a loan for the purchase of a new vehicle.
41. Mr. He first entered the United States on a F-1 Student visa which allowed him to be employed and earn income. However, after he was suspended by the University of Memphis on September 20, 1999, and his student visa was revoked, Mr. He was not legally permitted to be employed and earn income in the United States. Nevertheless, Mr. He has been employed and earned income in the United States, since September 20, 1999, and has failed to report his income to the Internal Revenue Service, thus defrauding the United States government.
42. Mrs. He is an impetuous person not subject to being intimidated or deterred in achieving whatever she sets as her goal. The evidence shows that she is calculating, almost theatrical, in her actions. The evidence further shows that she is dishonest and manipulative, and has a history of acting in an unstable manner when it serves her own self-interest. For example, during cross-examination, Mrs. He would begin sobbing when asked difficult questions. However, Mrs. He would immediately regain her composure when asked subsequent questions. It appears to the Court that Mrs. He's courtroom hysterics were calculated by Mrs. He in an effort to avoid answering the difficult cross-examination questions.
43. Though Mrs. He speaks sufficient English to carry on her daily affairs in the United States, she is not as proficient as Mr. He in knowledge or use of the English language and, unlike Mr. He, sometimes needs assistance with translation in technical or extraordinary use of

the English language. She has confidence in Mr. He, prefers Mr. He as her translator, has no desire to part company with Mr. He for any reason and intends to cooperate fully with Mr. He to remain together with him as a family and believes Mr. He has never failed to keep her fully and honestly informed about the legal matters involving AMH.

44. Although Mrs. He does not speak the English language fluently, she appears to speak and understand English better than she professes. For example, Mrs. He spoke English during some of the Hes' visits with AMH at the Bakers' home and when Mrs. He took the Hes' other children for medical treatment. She also spoke English during the incident when she was holding a sign outside of the Bakers' home, and the Bakers' neighbor, Rebecca Smith, asked Mrs. He to move her car, and she spoke English during the December 2003, incident at the Wal-Mart store. During the trial, in response to a question from attorney Linda Holmes, Mrs. He responded to the question by speaking in English, before the interpreter had begun interpreting Ms. Holmes' question to Mrs. He. Mrs. He said, "Mr. Parrish filed legal motion," then she stopped speaking English and began responding to the question in Chinese.
45. Mrs. He admitted signing a document in the Peoples Republic of China that falsely stated that she and Mr. He were married for the purpose of obtaining a visa allowing her to come to the United States.
46. Although the Hes were not married at the time, Mrs. He entered the United States illegally, in 1998, on a F-2 visa, as the wife of a person in the United States on a student visa, despite the fact that she indicated that she was single, not married, on AMH's birth certificate.

47. Because of her status as an illegal alien, Mrs. He was not legally permitted to be employed and earn income. Nevertheless, Mrs. He has been employed and earned income in the United States throughout most of her stay, but has failed to report her income to the Internal Revenue Service, thus defrauding the United States government.
48. Mrs. He only seems to be interested in regaining custody of AMH when deportation seems imminent. This fact is evidenced by Mrs. He filing the two (2) petitions to modify custody in close proximity to receiving calls from the United States Immigration & Naturalization Service ("INS"), regarding Mr. and Mrs. Hes' immigration status.
49. From the totality of the credible proof at trial, both Mr. and Mrs. He have shown themselves to be persons who do not consider themselves to be bound by the rule of law. Mr. and Mrs. He have demonstrated that they will do and say anything in order to achieve their desired goals.

III. CREDIBILITY OF OTHER WITNESSES

50. Dr. John Copper testified for the Hes during the trial as an expert in Chinese culture, to explain the Hes' conduct. Dr. Copper testified that in China telling a falsehood about family matters would be bad, but telling a falsehood to the government would not be as bad. The Court finds Dr. Copper's testimony to be totally lacking in credibility. The Court agrees with the findings of the United States Bankruptcy Court for the Western District of Tennessee, in its October 31, 2003, Memorandum Opinion, which was entered into evidence as Trial Exhibit 26, that Dr. Copper's testimony is unbelievable, and totally lacking in credibility. The

Court further finds that Dr. Copper is not an expert in Chinese adoption law, nor is he an expert on termination of parental rights.

51. Dr. Yih-Jia Chang testified as an expert witness on behalf of both Mr. and Mrs. He. The Court has previously ruled that the underlying facts or data relied upon by Dr. Chang in forming her opinion regarding Mrs. He's mental health indicate a lack of trustworthiness, and excluded Dr. Chang's testimony as to Mrs. He.
52. Dr. Chang testified, as to Mr. He, that she based her opinion about Mr. He's mental health on her clinical evaluation, mental status examination, and the MMPI test results. Dr. Chang testified that her clinical evaluation and mental status examination of Mr. He were based on questions she asked of, and responses given by, Mr. He. The Court finds the credibility of Mr. He to be seriously lacking; therefore, the opinions given by Dr. Chang, based on Mr. He's credibility, are entitled to no weight.
53. David B. Goldstein, Ph.D. ("Dr. Goldstein"), was appointed by the Court to serve as the court-appointed expert to advise the Court concerning the psychological evaluation of AMH. Dr. Goldstein was appointed by the Court upon the recommendation of the guardian *ad litem* and with the consent of the Bakers and the Hes. Initially, Dr. Goldstein was requested to conduct a psychological evaluation of AMH; however, the Court later, on February 12, 2002, expanded the evaluation to include the Bakers and the Hes, to the extent that Dr. Goldstein deemed necessary to prepare the psychological report concerning AMH. Dr. Goldstein ultimately determined that he could not conduct an evaluation of the Bakers and the Hes because Dr. Goldstein was concerned that his evaluating AMH, the Bakers, and the Hes might present a conflict of interest, since he was not conducting strictly a custody

evaluation, but an evaluation dealing with the possible termination of parental rights. Dr. Goldstein was also concerned that he was not qualified to conduct an examination of the Hes because of the language barrier.

54. Dr. Goldstein served the Court and provided the Court with his opinion, without any interest in the outcome of the cause and without representing the interests of either the Hes or the Bakers. Dr. Goldstein provided the Court with the benefit of his expertise regarding AMH's psychological well-being, and the possible affects on AMH of remaining with the Bakers and having contact with the Hes ended, or placing AMH with the Hes, and having contact with the Bakers ended.
55. The Court finds Dr. Goldstein to be a highly qualified, highly respected, experienced psychologist, who has been practicing in the Memphis, Shelby County, Tennessee, area for many years. The majority of Dr. Goldstein's training has been in the area of child psychology. Dr. Goldstein was diligent and thorough in his examination and evaluation of AMH and AMH's attachment with the Bakers, and with his evaluation of AMH's reaction to AMH's visit with the Hes in Dr. Goldstein's office, on September 23, 2003. Dr. Goldstein evaluated AMH over a period of several months. Dr. Goldstein has shown no bias or prejudice in the performance of his duties or in his testimony , but gave the Court his honest opinion, based on his clinical evaluation of AMH, his research, and his years of experience. The Court found Dr. Goldstein to be a very knowledgeable, honest and forthright witness.
56. Dr. John Robert Hutson is a highly qualified, highly respected, experienced psychologist, who has practiced in the Memphis, Shelby County, Tennessee, area for many years. Dr. Hutson never personally interviewed or evaluated AMH, so his testimony was limited to that

which he observed on the videotaped session with the Bakers, the Hes, and AMH in Dr. Goldstein's office on September 23, 2003, and his experience as a psychologist. Dr. Hutson's testimony was of little assistance to the Court.

57. Dr. John Victor Ciocca is a highly qualified, highly respected, experienced psychologist, who has practiced in the Memphis, Shelby County, Tennessee, area for many years. Dr. Ciocca never personally interviewed or evaluated AMH, so his testimony was limited to that which he observed on the videotaped session with the Bakers, the Hes, and AMH in Dr. Goldstein's office on September 23, 2003, and his experience as a psychologist. Dr. Ciocca had no opinion as to the level of AMH's psychological attachment to the Bakers or the Hes. Dr. Ciocca's testimony was of little assistance to the Court.

58. The guardian *ad litem*, Ms. Kimbrough Mullins, is a skilled attorney who has served the courts in Shelby County, Tennessee, as a guardian *ad litem* for the past fifteen (15) years. Ms. Mullins has served the Court, and represented and advocated AMH's best interests, to the best of her ability, in an exemplary manner, under very difficult circumstances. Ms. Mullins, in her fiduciary capacity to AMH and to the Court, has acted in good faith, has shown no bias or prejudice in the performance of her duties, but has steadfastly and diligently advocated for what Ms. Mullins considers to be in AMH's best interest, regardless of the consequences, based solely upon the information she gathered during her investigation. The Court found her to be an honest and forthright witness.

59. Kevin Weaver has been an attorney practicing in Memphis, Shelby County, Tennessee, for nineteen (19) years. For the last eleven (11) years he has practiced primarily adoption law. His practice consists of approximately 75 to 80% adoption cases. During 2003, Mr. Weaver

finalized over one hundred (100) adoption cases. He has lectured and taught adoption law to other attorneys. The court finds that Mr. Weaver is an expert in the area of adoption law. The Court finds that Mr. Weaver was a credible witness.

60. Julie Mize, Michael Lowry, Nancy Diane Thorn, Rebecca Smith, Diane Chunn Brower, Sarah Cloud, Candace Brown, Kenny Yao, John Astor, John D. Walt, Kathryn E. Story, and Stephanie Johnson, all testified during the trial of this cause. Each of these witnesses testified honestly and without bias. The Court finds each of these witnesses' testimony to be credible.

IV. DUE PROCESS CLAIMS

61. Both before and after June 4, 1999, the Hes had an ongoing relationship with John Walt, an experienced attorney practicing for many years in Memphis. Mr. Walt advised and interacted with Mr. He, as an outreach ministry without pay, to assist Mr. He with legal issues associated with sexual assault charges being pressed by the University of Memphis and by the State of Tennessee. Mr. Walt advised Mr. He that the outcome of said charges would be determinative of Mr. He's status as a student at the University of Memphis and his status as a legal alien in the United States. Mr. Walt met with Mr. He on five (5) or more occasions to advise Mr. He on the charges made by the University of Memphis and also to assist Mr. He in obtaining an attorney to represent Mr. He on the criminal charges brought by the State.

62. Although Mr. Walt was available to advise Mr. He about AMH's custody, Mr. He never made any mention of AMH to Mr. Walt, nor of the difficulties the Hes were having regarding custody of AMH.
63. Both before and after June 4, 1999, the Hes engaged the services of at least two attorneys in Memphis, Ms. Dell Stiner and another un-named attorney, to advise and represent the Hes in civil litigation arising from physical injuries Mrs. He allegedly sustained in November 1998. The Hes also spoke to another attorney that Ms. Chunn referred them to, Mr. Parke Morris, about the civil litigation. Neither of the Hes ever mentioned to any of these three attorneys the need for representation or advice regarding placing or regaining custody of AMH.
64. Both before and after June 4, 1999, Mr. He engaged the services of at least three attorneys to advise him and represent him in defense of the criminal charges brought by the State: Mr. AC Wharton, Mr. Stephen Sauer, and Mr. James Hodges, Jr. Mrs. He accompanied Mr. He on many occasions when Mr. He met with these attorneys. Neither of the Hes ever mentioned to any of these attorneys any need for representation or advice relative to AMH's custody. In fact, the Hes never even told these three attorneys about the existence of AMH.
65. Mrs. He testified that she sent her younger son, Andy, to the Peoples Republic of China because Mr. Hes' criminal attorney, AC Wharton, told Mrs. He that "they" would take the Hes' son and put him up for adoption if Mr. He did not agree to accept the guilty plea offer on Mr. He's criminal charge. Neither of the Hes ever mentioned to Attorney Wharton that

they also had an older child (AMH), or that they were having difficulty regaining custody of AMH.

66. Although Mr. and Mrs. He had numerous opportunities, neither of them ever sought the advice of any of the above-mentioned attorneys, never discussed the issue of the Hes giving up custody or of regaining custody of AMH, and never mentioned to any of these attorneys that the Hes had a child.
67. On June 2, 1999, attorney Kevin Weaver met with Mr. He and the Bakers and fully advised Mr. He and the Bakers of the legal ramifications of filing a petition for custody and of signing a consent order awarding custody of AMH. Mrs. He, after being fully advised of the meeting and of the purpose of the meeting by Mr. He, waived her right to be present at the meeting and told Mr. He to tell the others at the meeting that she was ready to proceed. Mr. Weaver answered all of Mr. He's and the Bakers' questions during the meeting. Mr. He later advised Mrs. He of the information that Mr. Weaver imparted at the meeting.
68. On June 3, 1999, Ms. Chunn and Mr. Kenny Yao, an experienced interpreter in English and Mandarin Chinese, met with Mrs. He, alone, in the Hes' apartment. Ms. Chunn wanted to make certain that Mrs. He understood what she would be doing if Mrs. He signed a consent custody order, and whether Mrs. He was one hundred percent willing for a transfer of custody of AMH from the Hes to the Bakers. Ms. Chunn explained to Mrs. He the things that Kevin Weaver had said to Ms. Chunn, the Bakers, and Mr. He, the day before in the meeting in Mr. Weaver's office. Mrs. He indicated that she understood everything that Ms. Chunn had told her through Mr. Yao. Mrs. He asked no questions of Ms. Chunn, through Mr. Yao.

69. On June 4, 1999, Ms. Sarah Cloud, with the assistance of a qualified interpreter, privately met with Mrs. He, without Mr. He, and fully explained the legal ramifications of both the Petition For Custody and the Consent Order Awarding Custody, both of which Mrs. He later voluntarily signed.
70. The Hes were familiar with the Juvenile Court for Memphis and Shelby County, Tennessee, before June 4, 1999, because they had sought the services of the Juvenile Court on or about February 23, 1999, when they spoke to Ms. Sarah Cloud about long-term foster care through the State of Tennessee Department of Childrens Services. Although the Hes had consulted with attorneys in the past regarding other legal matters, the Hes never inquired at Juvenile Court about getting an attorney to provide the Hes legal advice concerning the original transfer of custody of AMH.
71. A few months after the Hes signed the June 4, 1999, Consent Order Awarding Custody, the Hes went to the Juvenile Court and spoke with Ms. Cloud about getting assistance to file a petition to regain custody of AMH. Ms. Cloud directed the Hes to the appropriate Juvenile Court office to speak to a counselor, who would assist the Hes with filing a petition to modify custody and with putting the petition on the court docket for a hearing. Ms. Cloud advised the Hes that they should hire an attorney for legal advice and representation, and Ms. Cloud recommended the services of the Memphis Area Legal Services, if the Hes could not afford to hire an attorney.
72. Both Mr. and Mrs. He had many opportunities to obtain legal advice, and did receive legal advice from attorney Kevin Weaver, about their decision to petition the Juvenile Court to

place custody of AMH with the Bakers, before the Hes signed the petition and consent order.

73. There was no law, rule, regulation, fraud, duress, undue influence, or trickery which caused the Hes, at the outset, to petition the Juvenile Court to give legal custody of AMH to the Bakers.
74. The evidence establishes that there was no conspiracy to deprive the Hes of their right to due process or to the custody of AMH.
75. Ms. Sarah Cloud, Ms. Diane Chunn, Mid-South Christian Services ("Mid-South"), Mr. Kenny Yao, Mr. Kevin Weaver, Ms. Kimbrough Mullins, Ms. Linda Holmes, Dr. David Goldstein, Ms. Kathryn Story, and Mr. Larry Parrish played no part, individually or in concert or conspiracy with any other persons, to encourage, discourage, or facilitate, at any time: (1) the denial of either of the Hes' legal rights or entitlements; (2) the Hes' filing of a Petition for Custody in Juvenile Court on June 4, 1999, seeking to place AMH's custody with the Bakers; (3) the Hes' signing the June 4, 1999, Consent Order Awarding Custody of AMH to the Bakers; or (4) the Bakers' decision to file a petition to adopt AMH and to terminate the Hes' parental rights.
76. The first time the Bakers considered the idea of adopting AMH was in May 1999, when the Hes suggested to the Bakers that the Hes wanted the Bakers to adopt and raise AMH.
77. The Bakers did not consider the idea of adopting AMH again until attorney Kevin Weaver explained to the Bakers that they had a right to file a petition to adopt AMH and to terminate the Hes' parental rights, after the Hes signed the first Petition to Modify custody in Juvenile Court on May 3, 2000.

78. The Bakers did not decide to file a petition to adopt and terminate parental rights until after being served with the Hes' second Petition to Modify custody, filed in Juvenile Court on May 29, 2001. The Bakers sought legal advice of Mr. Weaver and then decided to file a petition to adopt AMH and terminate the Hes' parental rights.
79. The Bakers' decision to file a petition to adopt and to terminate the Hes' parental rights was made exclusively by the Bakers, alone, and was not made in concert or conspiracy with any other person or persons.

V. ABANDONMENT FACTORS

A. Chronology of Events

80. The Hes initiated the first contact with Mid-South Christian Services ("Mid-South") through a referral from one of the Hes' church members. Dianne Chunn ("Ms. Chunn") first met with the Hes while acting in her capacity as a birth-parent counselor for Mid-South on or about November 1, 1998. The Hes told Ms. Chunn that Mrs. He was pregnant and they wanted to place the unborn child for adoption. As a result of the first meeting with Ms. Chunn, the Hes completed a "pregnancy counseling status sheet" providing Mid-South basic information about the Hes, including that Mr. and Mrs. He were husband and wife.
81. On or about December 1, 1998, Mid-South formally opened a "birth-parent file" relating to the Hes and the adoption. As a birth-parent counselor for the Hes, Ms. Chunn's responsibilities were to provide ongoing counseling to the birth parents so the Hes could work through the pros and cons of adoption. As a part of her counseling, Ms. Chunn let the Hes review several profiles of prospective adoptive parents. The Hes selected a

prospective adoptive couple and, pursuant to the Hes' request, Ms. Chunn arranged a meeting with the Hes and that couple to discuss the possibility of adopting AMH.

82. On January 9, 1999, Ms. Chunn met with Mr. He at the hospital because Mrs. He had been hospitalized for vaginal bleeding, allegedly caused by an assault on Mrs. He. Mr. He told Ms. Chunn that Mrs. He felt "cheated" because the prospective adoptive family that the Hes met with on December 1, 1998, were not wealthy, as was the Hes' request. Mr. He told Ms. Chunn that the Hes felt that the prospective adoptive family should be "taking care of them" during the birth process, that is, the family should be visiting the Hes and bringing nutritious food and other things for the Hes. The Hes did not go through with the adoption to the family they had first selected to adopt AMH because Mrs. He thought that family was not wealthy enough and was too young.
83. On January 19, 1999, Mr. He asked Ms. Chunn to write a letter to the University of Memphis to advise university officials that the Hes were not prepared financially or emotionally to be parents at that time.
84. After AMH's birth on January 28, 1999, AMH experienced respiratory distress, which required AMH to remain in the hospital's neonatal intensive care unit for eleven days. After AMH's birth, Mrs. He changed her mind about giving AMH up for adoption, even though the Hes had already selected parents to adopt AMH and accepted gifts from them. Mrs. He informed Ms. Chunn of her decision. After AMH was discharged from the hospital on or about February 8, 1999, the Hes took AMH home to their apartment. Approximately two (2) days later, Ms. Chunn visited with the Hes and AMH in their apartment. The Hes explained to Ms. Chunn that they were having severe financial difficulties, and Ms. Chunn and the

Hes discussed the possible need for the services of the Tennessee Department of Childrens Services (DCS) to provide long-term foster care. Ms. Chunn explained to the Hes that Mid-South was unable to provide long-term foster care for AMH.

85. On February 10, 1999, Ms. Chunn met again with the Hes and AMH in their apartment. Mr. He told Ms. Chunn that he had to borrow money for the Hes' living expenses for the coming month, and was unsure where money for their future living expenses would come from. Mrs. He felt that the Hes would get additional money for future expenses from the lawsuit that the Hes were planning to file for personal injuries she sustained from the alleged assault on her.
86. On February 22, 1999, Mr. He called Ms. Chunn and told her that the Hes were still considering placing AMH for adoption. Ms. Chunn met with the Hes on February 23, 1999, and discussed adoption and long-term foster care.
87. On February 23, 1999, the Hes went to the Juvenile Court with AMH and talked with Ms. Sarah Cloud about placing AMH in long-term foster care with DCS. The Hes told Ms. Cloud that they had been talking with Ms. Chunn at Mid-South about their inability to take care of AMH. Ms. Cloud then called Ms. Chunn, who told Ms. Cloud that the Hes initially wanted to place AMH for adoption, but changed their minds and now wanted to place AMH in foster care. Ms. Chunn told Ms. Cloud that Mid-South could not provide long-term foster care for AMH, and that the Hes would have to go to DCS if the Hes needed long-term foster care for AMH. After her conversation with Ms. Chunn, Ms. Cloud suggested that the Hes consider placing AMH in shorter-term foster care to give the Hes an opportunity to decide whether they would be able to take care of AMH in the future or whether they would want to place

AMH for adoption. Ms. Cloud suggested that the Hes return to Ms. Chunn to determine if Mid-South could provide interim foster care for AMH, while the Hes decided what they wanted to do with AMH.

88. On February 24, 1999, the Hes delivered AMH to Mid-South and signed an agreement requesting that Mid-South take AMH into foster care for ninety (90) days.
89. The Bakers, who were the next family on the Mid-South foster care list, were asked by Mid-South to serve as foster parents of AMH for ninety (90) days, from February 24, 1999, through May 23, 1999, in order to give the Hes time to decide either to place AMH for adoption or to undertake the responsibility to support and care for AMH. Ms. Chunn and the Hes went to the Bakers' home with AMH on February 24, 1999. Ms. Chunn introduced the Hes to the Bakers, and the Hes and Ms. Chunn gave physical custody of AMH to the Bakers, pursuant to the foster care agreement.
90. Mid-South has had a relationship with the Bakers since 1997. The Bakers were on Mid-South's list of persons who are qualified and willing to serve as foster parents to children in Mid-South's custody, who are awaiting adoption. The Bakers began keeping foster children for Mid-South in 1997. The Bakers usually kept a foster child for seven to ten days, while the adoption of that child was being processed. The Bakers agreed to an extended foster care period for AMH because the Bakers had always accepted the children that Mid-South offered, and because the Hes needed a three (3) month period of time to decide whether they wanted to keep AMH or to give AMH up for adoption.
91. The Bakers were not under consideration as prospective adoptive parents for AMH on February 24, 1999, as the Hes had previously selected another prospective adoptive family.

Prior to February 24, 1999, the Bakers had made a deliberate decision that they had no interest in adopting any children, and in furtherance of that decision, Mrs. Baker had surgery in August 1998, to reverse an earlier tubal ligation, in order to make it possible for the Bakers to give birth to another child of their own.

92. AMH has been in the Bakers' physical custody since February 24, 1999, when AMH was twenty-seven (27) days old.
93. The Hes made their decision concerning the care, custody, and control of AMH. No one forced the Hes to relinquish care, custody, and control of AMH to Mid-South Christian Services, or to the Bakers. The Hes voluntarily exercised their fundamental right as parents to transfer custody of AMH to the Bakers.
94. During the ninety-day foster care period, February 24, 1999, to May 23, 1999, the Hes visited in the Bakers' home for approximately one (1) hour each week, a total of approximately twelve (12) hours during the first three months of AMH's life. During this period, neither the Bakers nor Mid-South placed any restrictions on the frequency or duration of the Hes' visits in the Bakers' home. The Hes never requested to visit AMH more frequently or for longer periods during the ninety-day foster care period. During the ninety-day foster care period, the Hes were free to terminate the foster care agreement with Mid-South and to regain full legal and physical custody of AMH.
95. On March 8, 1999, the Hes visited with AMH in the Bakers' home with Ms. Chunn present. Mr. He told Ms. Chunn that Mrs. He would readily agree to adoption if the adoptive couple would allow weekly visits until Mrs. He became pregnant with another child. Mr. He also told Ms. Chunn that, according to Chinese superstition, AMH was less than an ideal child

because of AMH's difficult birth. On March 30, 1999, Mr. He spoke with Ms. Chunn again about the possibility of adoption; he told Ms. Chunn that Mrs. He was comfortable with adoption, but Mrs. He wanted to maintain parental rights of AMH so she could remain in the United States.

96. In mid-April 1999, the Hes applied for a passport for AMH. The passport was issued May 1, 1999. The Hes looked for someone with a green card to take AMH to China at the end of the ninety-day foster care period, but they were unable to find a suitable person, so the Hes decided on the Bakers to take care of AMH.
97. The Bakers knew that the Hes intended to secure a passport for AMH in April 1999, because the Hes had requested the Bakers to provide a photograph of AMH and the Hes told the Bakers that they were going to have a passport made for AMH.
98. In May 1999, the Bakers did not know that the Hes were illegal aliens.
99. On May 19, 1999, four (4) days before the end of the ninety-day foster care agreement, Ms. Chunn met with Mr. He to discuss future options for AMH's care. Mr. He indicated to Ms. Chunn that the Hes wanted to maintain parental rights, but allow the Bakers to keep and raise AMH. On May 20, 1999, Ms. Chunn called Mr. He and told him that the Bakers were unwilling to agree to temporary custody with the Hes retaining parental rights to AMH. On May 21, 1999, Mr. He called Ms. Chunn and told her that the Hes had decided to take AMH back into their care.
100. The Bakers did not suggest to the Hes that the Bakers had any interest in adopting AMH until shortly before the May 23, 1999, expiration of the ninety-day foster care period, when the Hes approached the Bakers with a request that the Bakers adopt AMH.

101. On or about May 23, 1999, the Hes met with the Bakers in the Bakers' home. Mr. He told the Bakers that the Hes had decided that the Bakers were the family that the Hes wanted to adopt AMH. However, Mr. He told the Bakers that Mrs. He wanted to retain parental rights so AMH would retain the He surname. Mr. He explained to the Bakers that Mrs. He wanted AMH to retain the He surname because Mrs. He wanted to stay in the United States and she thought that if AMH kept the He surname it would help the Hes remain in America. The Bakers told Mr. He that they were unwilling to keep AMH on that basis.
102. Mr. He then told the Bakers that the Hes would take AMH back from the Bakers because the Hes wanted to give AMH to an attorney, in exchange for the attorney helping the Hes with Mrs. He's civil lawsuit, involving the alleged personal injuries she received while pregnant with AMH. Mrs. Baker told Mr. He that he could go to jail for doing that. Mr. Baker then suggested the Hes go into another room and talk. The Hes went into another room, returned in a few moments, apologized to the Bakers, and told the Bakers that Mrs. He really wanted to win her lawsuit, but they did not have the money to hire an attorney. Mr. He then told the Bakers that both Mr. and Mrs. He wanted the Bakers to take and raise AMH. The Bakers then agreed to custody, rather than adoption with the Hes still retaining their parental rights, because the Bakers were afraid of what might happen to AMH if they did not agree to take custody of, and raise, AMH. The Bakers told the Hes that they would agree to custody only on the condition that it be sanctioned by a court order and the Hes agreed. The Hes and the Bakers then entered into an oral agreement that the Bakers would have custody of, and would care for and raise AMH, until AMH's eighteenth birthday.

103. On May 24, 1999, Mr. He and Mrs. Baker called Ms. Chunn and told her that the Bakers and Hes had talked and the Bakers were now willing to accept temporary custody of AMH. Ms. Chunn got the impression from her conversation with Mr. He and Mrs. Baker that the Hes and the Bakers had agreed that the Bakers would raise AMH.
104. The Bakers and the Hes asked Ms. Chunn for advice as to whether and how a court order could be obtained to sanction their arrangement.
105. Ms. Chunn suggested that the Hes and the Bakers meet with an attorney to discuss the pros and cons of a custody agreement. Ms. Chunn gave no advice to either the Hes or the Bakers regarding whether the Hes or the Bakers should have separate attorneys to advise each of them concerning the legal implications of the Bakers' agreeing to assume the custody and care of AMH, without the Hes surrendering their parental rights.
106. After the May 24, 1999, conversation with Mrs. Baker and Mr. He, Ms. Chunn arranged a meeting with attorney Kevin Weaver on June 2, 1999, to explain the legal implications of transferring custody from the Hes to the Bakers. Mr. Weaver had previously advised Mid-South, as well as several other adoption agencies, on various legal matters, from time to time. Mr. Weaver was not acting as the attorney for Mid-South at the June 2, 1999, meeting, but was conducting the meeting as a favor to Mid-South. Mr. Weaver was not acting as the attorney for either the Bakers or the Hes at this meeting. Mr. Weaver had not met either the Bakers or the Hes before the June 2, 1999, meeting, nor did he meet separately with either the Bakers or Mr. He prior to the June 2, 1999, meeting.
107. Both the Bakers and the Hes were scheduled to meet with Mr. Weaver on June 2, 1999. However, at the last minute, Mrs. He was unable to attend this meeting because of her

work schedule. Mr. Weaver asked Mr. He if he wanted to postpone the meeting so Mrs. He could be present. Before the meeting began, Mr. He telephoned Mrs. He and explained to her that everyone was present and ready for the meeting and they were waiting on her to begin the meeting. Mrs. He told Mr. He that she was ready for the meeting to go forward and that they could proceed with the meeting without her. Mr. He told Mr. Weaver, Ms. Chunn, and the Bakers that he had spoken with Mrs. He and that she was ready to go forward, that they could proceed with the meeting without Mrs. He, and that Mr. He would explain everything to Mrs. He later.

108. Mr. Weaver then conducted the meeting and outlined to the Bakers and Mr. He what it meant to transfer custody and the risks and dynamics of temporary custody issues. Ms. Chunn was present throughout the meeting. Mr. Weaver explained that the Hes would be giving up certain parental rights, but not necessarily all parental rights. Mr. Weaver explained that the Bakers would be the ones with the ability to make the everyday decisions for AMH, i.e. school, healthcare, etc., but that the Hes would not be giving up their other parental rights.
109. Mr. Weaver told the Bakers and Mr. He that temporary custody meant someone taking care of and being responsible for someone else's child, and having all the legal responsibilities to provide for the child.
110. Mr. Weaver also explained to Mr. He the risk that if a temporary custody order was entered, a court would have to decide if there was a contest about the Hes regaining custody of AMH. Mr. Weaver explained that anyone who gives up even temporary custody takes the risk that they may not get custody back. Mr. Weaver also explained that a court would look

at whether there was a change of circumstances, and what was in the child's best interest in deciding whether to allow a change in custody.

111. Mr. He asked questions during the meeting about whether the Hes could see AMH and how often they could see AMH. Mr. Weaver fully answered all of Mr. He's questions.
112. On June 3, 1999, Ms. Chunn and Mr. Kenny Yao, an experienced interpreter in English and Mandarin Chinese, met with Mrs. He, alone, in the Hes' apartment. Ms. Chunn wanted to make certain that Mrs. He understood what she would be doing if Mrs. He signed a consent custody order, and whether Mrs. He was one hundred percent willing for a transfer of custody of AMH from the Hes to the Bakers. Ms. Chunn explained to Mrs. He the things that Kevin Weaver had said to Ms. Chunn, the Bakers, and Mr. He, the day before in the meeting in Mr. Weaver's office. Mrs. He indicated that she understood everything that Ms. Chunn had told her through Mr. Yao. Mrs. He asked no questions of Ms. Chunn, through Mr. Yao.
113. On the evening of June 3, 1999, Mr. He called the Bakers and told them that Mr. and Mrs. He would agree to sign a consent order allowing the Bakers to have custody of AMH.
114. On June 4, 1999, the Hes, the Bakers, and Ms. Chunn met at Mid-South's office. The Hes rode with the Bakers and Ms. Chunn in the Bakers' van to the Juvenile Court of Memphis and Shelby County, Tennessee.
115. Before the Hes signed the June 4, 1999 petition to change custody, Mid-South, through Ms. Chunn, signed the appropriate documents relinquishing all physical and legal custody of AMH that Mid-South had, by virtue of the ninety-day foster care agreement.

116. The Hes, the Bakers, and Ms. Chunn met with Ms. Sarah Cloud, a probation counselor and Foster Care Review Board coordinator for the Juvenile Court. Mr. Kenny Yao was also present for the meeting. Mr. Yao has been an official court translator for twenty-five years and is fluent in both Mandarin Chinese and English. Mrs. He speaks Mandarin Chinese and some English.
117. The Bakers and Ms. Chunn had requested an interpreter for Mrs. He to make certain that Mrs. He understood the proceedings and what she was agreeing to. The Bakers were concerned about Mrs. He changing her mind because she had changed her mind several times before. They were also concerned that Mrs. He might later claim that she did not understand what she was signing.
118. Ms. Cloud explained the Petition for Custody to the Hes. She explained the significance of the oath and the Hes' signature, under oath, on the Petition for Custody. The Hes signed the Petition for Custody, which stated, "that the parents are unable to financially care and provide for said child at this time," in front of Ms. Cloud.
119. Before the Hes signed the Consent Order Awarding Custody, Ms. Cloud met privately in a conference room with Mrs. He, Ms. Chunn, and Mr. Yao, without Mr. He being present, to explain to Mrs. He the meaning of the Consent Order Awarding Custody. Ms. Cloud related everything necessary to the interpreter, Mr. Yao, to explain to Mrs. He the meaning of the Consent Order Awarding Custody. Mr. Yao explained the Consent Order in the way he thought best for Mrs. He to understand it. He did not read the document to her word for word. Mr. Yao felt that he sufficiently explained the meaning of the document to Mrs. He. Mrs. He said that she understood what Ms. Cloud had said during this meeting, and she

made no statements to Ms. Cloud, Mr. Yao, or Ms. Chunn that she did not understand everything that Mr. Yao told her. Mrs. He did ask if this would be temporary custody, and she said the word “temporary” in English.

120. During the private conference with Ms. Cloud, Mr. Yao, and Ms. Chunn, Mrs. He was tearful, emotional, and frequently crying. Mrs. Chunn, who has many years of experience as a birth and adoption counselor, testified that it is not uncommon for birth mothers to be upset and tearful when signing documents affecting the mother’s custody or parental rights. Ms. Chunn further testified that being tearful, emotional, or upset is not an indication that the birth mother does not understand what she is doing.
121. After the private conference with Mrs. He, Ms. Cloud talked to both Mr. and Mrs. He and told the Hes that if the Bakers later refused to return custody of AMH to them, that the Hes would have to go to court and let a judge decide whether the Hes could have custody of AMH returned to them. Mrs. He emphasized that she did not intend to place AMH for adoption, but intended to place custody of AMH with the Bakers, reserving her right to return to Juvenile Court to petition the court for return of custody to the Hes, if she made such a choice in the future.
122. Ms. Cloud had a routine manner of handling petitions for custody, and she has handled hundreds of those cases. If anyone disagreed, or expressed any doubts about the understanding of, or willingness to sign, a consent order awarding custody, it was Ms. Cloud’s practice to set petitions for custody for a hearing before the Juvenile Court Judge or a Referee. Ms. Cloud had no doubt that both Mr. and Mrs. He understood the Consent Order Awarding Custody, and signed it freely and voluntarily.

123. The Hes, the Bakers, Ms. Cloud, Mr. Yao, and Ms. Chunn were present in the conference room when Mr. and Mrs. He signed the June 4, 1999, Consent Order Awarding Custody. Neither the Hes nor the Bakers asked any questions when all of the parties signed the Consent Order Awarding Custody.
124. Ms. Cloud would not have allowed any of the parties to sign the consent order if either Mr. or Mrs. He, or Mr. and Mrs. Baker were not in agreement regarding custody of AMH. Ms. Cloud would not have allowed any of the parties to sign the consent order if she felt that anyone was being forced to sign the Order, or if she felt that anyone did not understand the Order.
125. Neither Mr. nor Mrs. He requested an interpreter for themselves or for each other. However, the Bakers requested an interpreter for Mrs. He to ensure her understanding of the document before she signed it. Neither the Hes nor the Bakers requested to have an attorney present in Juvenile Court on June 4, 1999, before the parties signed the Consent Order Awarding Custody of AMH to the Bakers.
126. The evidence establishes that both the Hes and the Bakers understood the June 4, 1999, Consent Order Awarding Custody before they signed it.
127. The evidence establishes that Mr. and Mrs. He understood that if the Bakers did not agree to relinquish custody of AMH, the only way for the Hes to regain custody of AMH would be for the Hes to petition a court to regain custody, and the court would then determine whether the Hes would be allowed to regain custody of AMH based on a change in circumstances.

128. The evidence establishes that both Mr. and Mrs. He understood, before they signed the June 4, 1999, Consent Order Awarding Custody, that if they filed a subsequent petition to regain custody of AMH, there would be no guarantee or assurance that a court would allow the Hes to regain custody of AMH.
129. There is no credible evidence to support the Hes' contention that on June 4, 1999, the Hes understood that all the Hes had to do to regain custody of AMH in the future was to petition a court and custody of AMH would be returned automatically to the Hes.
130. The Hes and Ms. Chunn rode back to Mid-South's office in the Bakers' van. The Hes, the Bakers, and Ms. Chunn had normal, pleasant conversations on the ride back to Mid-South. Mrs. He was no longer crying or upset.
131. After the entry of the Consent Order Awarding Custody on June 4, 1999, the Hes wanted AMH to call Mr. and Mrs. Baker "mommy" and "daddy," and wanted AMH to call Mr. and Mrs. He "Jack" and "Casey." Sometimes Mr. He would refer to himself, when speaking to AMH, as "Uncle Jack." AMH has always referred to the Hes as "Jack" and "Casey," since AMH was old enough to talk.
132. Mrs. Baker began keeping a journal of "Visits from Jack and Casey" on June 5, 1999. She kept this journal because Attorney Kevin Weaver had advised the Bakers and Mr. He, at the June 2, 1999, meeting, that the consent custody arrangement could go on for one (1) year or for eighteen (18) years. Because of the uncertainty of the length of time of the custody arrangement, and because of the Bakers' fear of what would happen to AMH if the Hes obtained custody of AMH, Mrs. Baker wanted to keep a record of the visits.

133. On July 25, 1999, Mr. He called Mrs. Baker and asked Mrs. Baker to go to a television station with AMH and the Hes to talk about the Hes' civil lawsuit for Mrs. He's personal injuries from the alleged assault. Mr. He wanted to try to establish that AMH received personal injuries, *in utero*, from the assault.
134. On November 14, 1999, Mr. He called Mrs. Baker and told her that the Hes were bringing a friend, Elizabeth Marshall, with them to visit AMH the next day. Mr. He asked the Bakers to pretend that they were foster parents of AMH, not custodial parents, during this visit. Ms. Marshall asked Mrs. Baker how long the Bakers had been foster parents and how she could give AMH up after fostering AMH for so long. Mrs. Baker told Ms. Marshall that the Bakers had no intention of giving up AMH. During the visit, Ms. Marshall kept referring to AMH as "(AMH) Marshall." At a minimum, the implication is that there had been discussions between the Hes and Ms. Marshall about adopting AMH. After the visit, Mrs. Baker asked the Hes why they had brought Ms. Marshall to visit AMH. Mrs. He became agitated, said that Mrs. Baker was rude to Ms. Marshall, and Mrs. He refused to answer the question.
135. In August 1999, the Bakers told the Hes that Mrs. Baker was pregnant and she was due to deliver in February 2000. On the September 11, 1999, visit, the Hes expressed how excited they were that AMH would have a new sibling to grow up with. On the September 19, 1999, visit, Mrs. He commented that she was happy that AMH would have a sibling to go to school with. On October 15, 1999, the Hes asked the Bakers to promise that they would always send AMH to Christian schools. On October 31, 1999, the Bakers told the

Hes that the Bakers would like to have photographs of the Hes while the Hes were young to be able to share with AMH when AMH grew up.

136. On December 22, 1999, the Hes brought gifts for the Bakers and all of their children, but did not bring a gift for AMH.
137. On February 28, 2000, after the birth of the Bakers' youngest child, Mrs. He told the Bakers that she was pleased that AMH had a new sibling, near AMH's age.
138. On May 3, 2000, the Hes talked to the Bakers about the kind of lessons the Hes wanted AMH to have, and the Hes inquired of the Bakers about the kind of college the Bakers planned to send AMH.
139. On May 3, 2000, the Hes signed a Petition to Modify the June 4, 1999, Juvenile Court Consent Order Awarding Custody. That petition was filed in the Juvenile Court on June 19, 2000. The Hes did not discuss with the Bakers the Hes' intention to pursue the petition to modify custody before the Hes went to Juvenile Court to begin the procedure.
140. Mr. He received a telephone call from the INS, regarding Mr. and Mrs. Hes' immigration status, around the same time the Hes signed the May 2000 Petition to Modify in Juvenile Court. Due to the close proximity of the call from the INS and the filing of the petition, the evidence shows that the Hes wanted to retain some parental rights only for the purpose of remaining in the United States.
141. On May 4, 2000, Ms. Chunn called Mrs. Baker to inform her that the Hes had signed a petition to modify custody in Juvenile Court. Mr. Baker called Mr. He to arrange a meeting between the two of them. That same day, Mr. Baker met with Mr. He near the clubhouse at the Hes' apartment complex. Mr. Baker asked Mr. He why the Hes had signed the Petition

to Modify in Juvenile Court. Mr. He told Mr. Baker that it was not Mr. He, but Mrs. He, who insisted on filing the Petition to Modify. Mr. Baker reminded Mr. He that the Hes had requested and agreed that the Bakers would raise AMH until age eighteen. Mr. He acknowledged that there was such an agreement, but that he and Mr. Baker needed to discuss making changes to that agreement. Mr. He told Mr. Baker that the Hes were going to ship AMH to China, but that he did not want to do that because the death rate for children of AMH's gender was fifty (50%) percent in the Peoples Republic of China. Mr. He stated that he did not want that to happen to AMH, but that he wanted AMH to stay with the Bakers. Mr. Baker got upset and started crying. Mr. Baker told Mr. He that Mr. Baker would do everything physically and financially he could do to prevent the Hes from sending AMH to the Peoples Republic of China. Mr. Baker then agreed to discuss making changes to their original agreement with Mr. He.

142. Mr. He discussed three possible changes to the original agreement with Mr. Baker. Mr. He wrote the first two options in his handwriting on a piece of paper, and he then dictated the third option, which Mr. Baker wrote on the same piece of paper. The three options were:

Option number one: The Bakers agree to give AMH back to the Hes without disputing custody in Court. The Hes agree that, in the event the Hes have to leave for China, they will let Bakers adopt AMH forever. The Bakers agree that they will not do anything to cause the Hes to leave the United States, by reporting the Hes to the United States government.

Option number two: The Hes agree to stay in Memphis as long as they stay in the United States. The Hes will allow the Bakers to visit AMH in the Bakers' home no less than twice a week.

Option number three: The Bakers and the Hes agree to keep their current agreement, with one supplement; the Hes may take AMH back to their home one

day every other week. Such agreement will continue for 18 years. The Hes agree to leave care of AMH's passport to the Bakers.

143. On May 7, 2000, the Hes brought two people, Barney and Rosemary Binion, with them to the Bakers' home to visit AMH. During the visit, the Hes wanted AMH to call the Binions "mawmaw and pawpaw," or something to that effect. Sometime during the visit, Mrs. Baker was in the kitchen when Mr. He came into the kitchen and told her that "everything is going to be alright." Later, Mr. He patted Mrs. Baker on the back and told her "don't worry, I will talk Casey into letting AMH stay."
144. On May 27, 2000, Mr. He kept making remarks about AMH and the Bakers' youngest daughter growing up together.
145. On June 28, 2000, a hearing was conducted on the Hes' first Petition to Modify custody in the Juvenile Court before Referee Claudia Haltom. Prior to the hearing, a Court Appointed Special Advocate ("CASA") conducted an investigation relative to the allegations contained in the May 3, 2000, petition, and provided a report of the investigation to Referee Haltom. The Bakers hired Kevin Weaver to represent them at this hearing. Mr. Weaver appeared with the Bakers to oppose the Petition to Modify custody.
146. Referee Haltom asked Mr. He how the Hes planned to take care of AMH if they regained custody. Mr. He responded that the Hes planned to send AMH to the Peoples Republic of China and the Hes would send \$25.00 per month to China for AMH's support.
147. At the conclusion of the hearing, Referee Haltom entered an order in Juvenile Court on June 28, 2000, denying the Petition to Modify custody.

148. On September 11, 2000, Mr. He asked Mrs. Baker if she could show Mrs. He how to take care of the Hes' new baby, which was due in October 2000.
149. On December 23, 2000, the Hes visited AMH in the Bakers' home, but they brought no gift for AMH.
150. On January 28, 2001, AMH's second birthday, the Hes came to the Bakers' home to visit AMH and requested of the Bakers that the Hes be allowed to take AMH with them to have a family portrait made. The Bakers refused the Hes' request because AMH had been ill for several days prior to January 28, 2001. The Hes then became upset and angry, started raising their voices, and Mrs. He started screaming and crying. AMH then became upset and the Bakers asked the Hes to leave the Bakers' home. The Hes refused to leave. Mr. He became very pushy and told Mr. Baker to call the police. Mr. He told the Bakers, "I won't leave here." The Bakers then called the police to have the Hes removed from the Bakers' home.
151. Shelby County Sheriff's Deputies Astor, Mills, Blankenship, and Dugard came to the Bakers' home in response to the January 28, 2001, disturbance call. When the Deputies arrived at the Bakers' home, Mr. and Mrs. Baker were calm and Mr. and Mrs. He were very irate and agitated. The Hes continued to be upset and agitated while the deputies conducted their investigation of the incident. During the investigation, the Hes were outside the Bakers' home yelling, screaming, and causing a disturbance.
152. Deputy John Astor could have arrested Mrs. He on January 28, 2001, because she was causing a disturbance outside the Bakers' home. Neither Mr. nor Mrs. Baker asked Deputy Astor to arrest Mr. or Mrs. He during the January 28, 2001, incident. After spending

approximately forty-five minutes to one hour at the Bakers' home on January 28, 2001, Deputy Astor told the Hes to leave the Bakers' home and not to come back again that day. The reason Deputy Astor told the Hes not to come back to the Bakers' home that day was because he wanted to neutralize the situation and because he did not want Mrs. He to be arrested. Deputy Astor advised the Hes that their disagreement with the Bakers was a civil matter, and he advised the Hes to seek legal advice from an attorney about the matter.

153. Both Mr. and Mrs. He testified that they did not return to the Bakers' home to visit AMH after the January 28, 2001, incident because they were afraid that they would be arrested by the police. However, the Court finds this testimony lacking in credibility, since there have been numerous instances when the police were called due to Mrs. He's inappropriate behavior:

- a. In November 1998, Mrs. He went to the office of Kathryn E. Story, Assistant Dean of Students for Social and Ethical Conduct at the University of Memphis. Mrs. He had previously met Ms. Story when Ms. Story went with the Hes to inspect the building where Mr. He said he had been with the Chinese student, who had made the sexual assault allegations against Mr. He. Mrs. He had returned to Ms. Story's office, apparently upset with Ms. Story. Mrs. He was very upset and called Ms. Story a racist devil. Ms. Story directed Mrs. He to go to a conference room to try to calm Mrs. He. While she was in the conference room, Mrs. He put her head back, held her breath, with mucous coming from her nose and spittle coming from her mouth. Ms. Story was very concerned about Mrs. He's condition. Ms. Story called a psychologist to come to try to calm Mrs. He down. Mrs. He continued to be very upset, holding her breath, gasping, and making a loud disturbance. The psychologist was unable to calm Mrs. He down. Ms. Story unsuccessfully tried to reach Mr. He by telephone. Ms. Story then told her secretary to call the University of Memphis campus police. The campus police arrived and got Mrs. He to leave the conference room and go into an adjoining room. Ms. Story then attempted to resume conducting business with students, however, she could not hear because Mrs. He was still causing a disturbance in the adjoining room. Ms. Story then told her secretary to call for an ambulance for Mrs. He. The ambulance arrived and took Mrs. He away.

- b. On another occasion, August 1, 2000, while Mrs. He was visiting with AMH in the Bakers' home, when Mrs. Baker told Mrs. He that Mrs. Baker had to leave for an appointment, Mrs. He became very angry and started screaming at Mrs. Baker that Mrs. He would not leave. Mrs. He began screaming that the Bakers were "bad people, demons" and that Mrs. He was going to take AMH and leave. Mrs. He told Mrs. Baker to call 911 and the police, if Mrs. Baker wanted Mrs. He to leave. Mrs. He was holding AMH in her arms and AMH was upset and crying loudly. Mrs. Baker then telephoned Mr. Baker, who, in turn, telephoned Mr. He, who was working in Macon, Georgia at the time. Mr. Baker asked Mr. He what the Bakers should do about Mrs. He. Mr. Baker asked Mr. He to call Mrs. He to try to calm her. After Mr. Baker arrived at the Bakers' home, Mr. Baker again called Mr. He to ask Mr. He if he had talked to Mrs. He. Mr. He responded that he had talked to Mrs. He, but she refused to leave, so the Bakers should call the police. Mrs. Baker then called the police, who came to the Bakers' home. The police advised Mrs. He to leave the Bakers' home and Mrs. He complied and left. The entire incident lasted approximately two hours. Mrs. He returned periodically to the Bakers' home after the August 1, 2000, disturbance, to exercise visitation with AMH, the same as she had done before the August 1, 2000, disturbance, until the January 28, 2001, disturbance.
- c. On another occasion, sometime after the January 28, 2001, disturbance, Rebecca Smith, a neighbor of the Bakers, saw Mrs. He standing beside her car in front of the Bakers' home, holding a sign. Ms. Smith approached Mrs. He and asked Mrs. He to move her car because Ms. Smith was afraid for Mrs. He's safety. Mrs. He refused to move her car so Ms. Smith went inside her home and called the police. Police officers arrived at the Bakers' home and spoke to Mrs. He, and, after that conversation, Mrs. He moved her car, but remained at the Bakers' home with her sign, and the police officers left.
154. Mr. He received a second telephone call from the INS regarding the Hes' current immigration status in the United States sometime in March, April, or May, 2001, around the same time that Mrs. He filed a second Petition to Modify custody in the Juvenile Court. Again, due to the close proximity of the call from the INS and the filing of the petition, the evidence shows that Mrs. He wanted to retain some parental rights for the sole purpose of avoiding deportation.

155. On April 9, 2001, Mrs. He signed the second Petition to Modify the Juvenile Court Consent Order Awarding Custody, which was filed in the Juvenile Court on May 29, 2001.
156. The Bakers filed the Petition For Adoption and Termination of Parental Rights on June 20, 2001, four (4) months and twenty (20) days after the incident in the Bakers' home on January 28, 2001.

B. Willful Failure to Support

157. The Hes had the ability to pay child support payments for AMH from January 28, 2001, to June 20, 2001.
158. The Hes swore, under oath, in the Petition to Modify custody that they signed on May 3, 2000, that "circumstances had changed" and that the Hes were "fully willing and able to properly care and provide for AMH," yet they willfully failed to provide support for AMH after May 3, 2000.
159. Mrs. He swore under oath on April 9, 2001, in the Petition to Modify custody, that the Hes were "able to provide care, support and proper supervision for AMH," yet, again, they willfully failed to provide support for AMH before and after April 9, 2001.
160. Even though there was no child support order in place, the Hes knew they had an obligation to provide child support for AMH from January 28, 2001, to June 20, 2001, as evidenced by statements made to Referee Haltom at Juvenile Court and the fact that they provided support for their son, Andy.
161. The Hes paid no support for AMH from January 28, 2001, to June 20, 2001.

162. During the June 28, 2000, hearing before Referee Haltom at the Juvenile Court, Mr. He told Referee Haltom that the Hes would send \$25.00 per month to China for AMH's support, if the Hes regained custody of AMH.
163. The Hes paid someone to take their younger son, Andy, to the Peoples Republic of China during the month of May 2001. The Hes began sending \$1,000.00 per month to China to support their son, Andy, sometime during May 2001.
164. Sometime after sending her son, Andy, to China, Mrs. He purchased a new computer.
165. The Hes took vacation trips to New Orleans, Atlanta, Arizona, Ohio, and California, between June 4, 1999 and June 20, 2001. The Hes also took trips for other purposes to Atlanta and Washington, D.C., during the same time period.
166. The Hes lived in an apartment and paid monthly rental payments of \$625.00 during the period from January 28, 2001, to June 20, 2001.
167. The Hes used their economic resources to accumulate and purchase non-necessary possessions and to take multiple vacations for pleasure and several trips for other purposes, all consistent with the Hes' agreement with the Bakers that the Bakers would raise AMH until age eighteen, and evincing the Hes' intention to forego all parental obligations and responsibilities for AMH.

C. Hes' Child Support

168. During the foster care period, February 24, 1999, to May 23, 1999, the Hes put a sum of money, approximately \$300.00, on the Bakers' couch during a visit. Mrs. He told the Bakers that the Hes would give the Bakers more money for AMH's support as soon as they were financially able. Mrs. Baker told the Hes that the Bakers could not take the money.

The Bakers were not allowed to accept money for foster children in their care, except for the \$6.00 per day that Mid-South paid the Bakers under the foster care agreement with Mid-South.

169. On June 4, 1999, when the Hes signed the Juvenile Court Consent Order Awarding Custody, there was no mention of child support.
170. Because of the agreement with the Hes that the Bakers were to rear AMH to age eighteen, the Bakers did not expect the Hes to make payments to support AMH, and the Bakers never asked the Hes to pay child support for AMH, after the June 4, 1999, Consent Order Awarding Custody was entered.
171. By signing the June 4, 1999, Consent Order Awarding Custody, the Hes intended to absolve themselves of all parental obligations to provide support, or any other care for needs of AMH during the AMH's minority.
172. During the Hes' approximate eighty (80) visits with AMH, between June 4, 1999, to January 28, 2001, they occasionally brought items for AMH. The items the Hes brought to AMH were children's books, food items (pears, apricots, watermelon seeds, Jello, baby food, porridge, and a whole, bone-in fish), articles of used clothing, a stuffed animal, a box of diapers, an inexpensive necklace, and a small Sesame Street suitcase. All of these items were of insubstantial economic value and amounted to token support.
173. The Hes provision of only token support for AMH from June 4, 1999 to January 28, 2001, was consistent with the Hes' intent to absolve themselves of all parental responsibilities to AMH.

D. Willful Failure to Visit

174. The Hes did not attempt to otherwise call, write, or make any other attempt to contact the Bakers about visiting AMH, or to inquire about AMH's well-being from January 29, 2001, to June 20, 2001.
175. The Hes willfully failed to visit AMH from January 29, 2001, to June 20, 2001.
176. The Hes testified that they did not visit AMH after January 28, 2001, because they feared for their personal safety if they returned to the Bakers home for a visit. The Court finds the Hes testimony to be lacking in credibility.
177. After January 28, 2001, the Hes willfully made the decision not to visit AMH.
178. Between January 28, 2001, and June 20, 2001, the Hes never visited AMH and never made a request to the Bakers to visit AMH.
179. The Hes right to visit AMH was never restricted by any court until February 8, 2002, when this Court entered an order prohibiting the Hes from attempting "to have any contact, direct or indirect, in person, or otherwise, with AMH," until further order of the Court. The Court entered the February 8, 2002, "no-contact" order because, on February 7, 2002, the Court had ordered the Hes to deliver AMH's passport to the Clerk & Master by 4:00 P.M. that day. At 4:00 P.M. on February 7, 2002, the Hes' counsel telephoned the Court and advised the Court that the Hes had no intention of complying with the Court's order, and the Court then entered the "no-contact" order the next day.
180. The Bakers were willing to allow the Hes to have visits with AMH after the January 28, 2001, disturbance in the Bakers' home, but the Hes never contacted the Bakers and requested any visitation with AMH.

181. Immediately after the January 28, 2001, disturbance, the Bakers decided that all future visits by the Hes would have to be arranged at a location other than the Bakers' home because of the August 1, 2000, and January 28, 2001, disturbances.
182. Immediately after January 28, 2001, in furtherance of the necessity to arrange future visitations at a site other than the Bakers' home, Mrs. Baker telephoned the Exchange Club Family Center to inquire about its ability to provide visitation services and facilities for any future visits with AMH by the Hes.
183. The Bakers were willing to allow the Hes to have visits with AMH, through the facilities of the Exchange Club Family Center, even after Mrs. He signed her second Petition to Modify custody.
184. The only contact the Hes made with the Bakers after January 28, 2001, occurred on April 2, 2001. On that date, Mrs. He called the Bakers' home and left the following message on the Bakers' telephone answering machine: "Come to my home and get your baby bed, we are moving, thank you, bye bye."
185. The Bakers did not respond to Mrs. He's April 2, 2001, telephone call because Mrs. He did not say anything about AMH or about wanting to visit AMH. The Bakers did not go to the Hes apartment after Mrs. He's April 2, 2001, telephone call.
186. The INS contacted Mr. He about the Hes' immigration status in March, April, or May, 2001.
187. Mrs. He signed a second Petition to Modify the Consent Order Awarding Custody on April 9, 2001, that was subsequently filed in Juvenile Court on May 29, 2001. The Court notes that Mrs. He did not request visitation with AMH when she filed the petition to modify custody. It is well-settled that a parent may always petition to have visitation reinstated

upon a showing of changed circumstances.⁴ Mrs. Hes' willful failure to seek reinstatement of visitation with AMH demonstrates that her goal in filing the Petition to Modify to regain custody was for the sole purpose of remaining in the United States and avoiding deportation. Mrs. Hes' failure to ask the Court to reinstate visitation with AMH, when she could have easily done so, evinces Mrs. Hes' willful abandonment of AMH.⁵

188. The Bakers filed the Petition For Adoption and to Terminate Parental Rights in this Court on June 20, 2001, and on June 22, 2001, the Juvenile Court for Memphis and Shelby County, Tennessee deferred to this Court's jurisdiction pursuant to *Tennessee Code Annotated* § 36-1-116(f)(2), and Mrs. He's May 29, 2001, Petition to Modify was transferred to, and assumed by, this Court.

E. Hes' Visitation from June 4, 1999 to January 28, 2001

189. The Hes visitation and contact with AMH has been subject to the Bakers' discretion since the June 4, 1999, Consent Order Awarding Custody of AMH to the Bakers.
190. The Bakers did not obstruct, inhibit, discourage, or otherwise interfere with any reasonable desire on the part of either Mr. or Mrs. He to visit AMH.
191. Between June 4, 1999, and January 28, 2001, either Mr. or Mrs. He, or both, visited AMH in the Bakers' home, approximately eighty (80) times. The Hes visited AMH, on average, approximately once per week. There were some occasions when the Hes would go two weeks or longer between visits with AMH. The average time of each visit was approximately one (1) hour, with the shortest visit lasting approximately thirty (30) minutes

⁴*White v. White*, 2000 Tenn. App. LEXIS 259 (April 26, 2000).

⁵Dawn Coppock, *Coppock on Tennessee Adoption Law*, (Matthew Bender, 2003), at 35.

and the longest visit lasting approximately two (2) hours. The approximately eighty (80) hours of time that the Hes have visited with AMH, from June 5, 1999, to January 28, 2001, amount to a total of less than four (4) days of AMH's life.

192. The visitation by either Mr. He or Mrs. He, or both, from June 4, 1999, to January 28, 2001, was insignificant, token visitation.
193. Mr. or Mrs. He, or both, missed several scheduled visits with AMH and sometimes did not call the Bakers to notify them that they would be unable to appear for the visits.
194. Mr. or Mrs. He, or both, were sometimes late for scheduled visits with AMH, without notifying the Bakers that the Hes would be late.
195. The Bakers allowed the Hes to make up missed visits with AMH, even when the Hes had failed to call the Bakers to advise them that the Hes would not appear for a scheduled visit.
196. The Bakers would sometimes schedule visits with AMH for the Hes at times that were not convenient for the Bakers' schedule.
197. Mr. He interacted very little with AMH during the visits. In fact, he spent most of his time during the visits talking to Mr. Baker.
198. Although Mr. Weaver explained to the Bakers their right to file a petition to adopt and to terminate parental rights in May 2000, the Bakers decided against filing such a petition. The Bakers did not discontinue, or attempt to discontinue, the Hes' visitation while the Hes' Petition to Modify custody, signed on May 3, 2000, and filed in Juvenile Court on June 19, 2000, was pending. The Hes visits with AMH in the Bakers' home also continued uninterrupted, even after the Hes' Petition to Modify custody was dismissed by the Juvenile Court on June 28, 2000.

199. During the months of July and August 2000, Mr. He visited AMH in the Bakers' home only two (2) times because he was temporarily working in the Atlanta, Georgia, area. The Bakers offered Mr. He the opportunity to visit AMH during this period of time, when he would periodically return to Memphis, but Mr. He told the Bakers that he was too busy to schedule a visit with AMH.
200. The Bakers put reasonable restrictions on the Hes' visits after the August 1, 2000, disturbance, when Mrs. He refused to leave the Bakers' home until the police came and ordered Mrs. He to leave.

F. Child Support Payments and Attempted Visitation After June 20, 2001

201. The Hes started sending the Bakers checks for AMH's support in August or September 2003. The Bakers have not cashed any of those checks.
202. The Hes first attempted to visit AMH after the June 20, 2001, Petition for Adoption and to Terminate Parental Rights, by filing a Motion for Immediate Visitation with this Court on February 20, 2002.
203. The Hes' attempts to pay support and to visit after June 20, 2001, were attempts to repent from, or rectify the Hes' willful failure to support or to visit AMH for four (4) consecutive months before the filing of the Petition to Terminate Parental Rights.

VI. SETTLED PURPOSE TO FOREGO ALL PARENTAL RIGHTS

204. Although the "settled purpose doctrine" was repealed legislatively in 1996 and no longer has any force or effect as law in Tennessee, a review of the evidence in this cause

establishes that the actions of the Hes evince a settled purpose to forego all parental rights and responsibilities.

205. From June 4, 1999, through June 20, 2001, the Hes' visits with AMH were so sporadic, and of such short duration, that it evinced a desire to forego their parental responsibilities to AMH, and it was in conformity with the Hes' agreement that the Bakers would raise AMH until age eighteen.
206. From June 4, 1999, through June 20, 2001, the frequency and duration of the Hes visits with AMH evinced their intention to have only enough contact with AMH to serve the Hes' stated objective to avoid deportation.
207. On or about the times that the Hes filed a petition to modify custody, Mr. He had been contacted by the INS regarding the Hes' illegal alien status.
208. The United States Immigration officials have suspended the Hes' deportation proceedings until this cause is concluded.
209. The Hes failure to provide more than token support for AMH from June 4, 1999 through January 28, 2001, evinced the Hes' intent to relegate all responsibility for AMH's care and support to the Bakers, consistent with the Hes' agreement that the Bakers would raise AMH to age eighteen (18).

VII. BEST INTEREST FACTORS

210. Dr. David Goldstein performed a psychological evaluation of AMH over a period of seven months, from January 21, 2002, to July 2, 2002. After reviewing Dr. Goldstein's report, his trial testimony, and the entire record in this cause, the Court finds, due to AMH's highly

organized manner, AMH is not good at adaptability and is easily upset by changes. Permanently removing AMH from AMH's present environment may cause lasting harm from the loss of AMH's psychological parents, the Bakers. AMH has a powerful parent-child bond with the Bakers, which was developed during the first three (3) years of AMH's life, which is considered a critical period for the building of such attachments. Because of this strong bond, if AMH is separated from the Bakers, AMH may experience intense separation anxiety or a grief reaction akin to depression. This reaction may disrupt AMH's emotional, educational, and social development. The long-term risks of removing AMH from the Bakers' home include increased vulnerabilities to anxiety, mood disorders in adolescence and adulthood, reduced stress tolerances, and disturbances in future intimate relationships. These risks would not dissipate even if the Hes were able to provide a stable home for AMH after AMH's removal from the Bakers' home.

211. AMH's transcultural placement with the Bakers also has risks, including AMH's possible questioning of AMHs' identity, origins, and the motives of AMH's biological parents. Another risk that is inherent in any adoption is the risk that the adopted child will develop feelings of abandonment as the child grows older, if the parental rights of the biological parents are terminated. Such risks can be mitigated so long as the Bakers are sensitive and responsive to issues surrounding racial, cultural, and biological identity, and to issues related to any feelings of abandonment AMH may at some point develop. The Bakers have demonstrated a sensitivity and responsiveness to such issues.
212. Dr. John Hutson testified that the Bakers are the psychological parents of AMH, and that removal of AMH from the Bakers would terminate AMH's relationship with AMH's

psychological parents, which would be traumatic for AMH. Dr. Hutson testified that the Hes are not AMH's psychological parents. Dr. Hutson testified that there would be a breaking off of a parental relationship if the Hes told AMH to call the Bakers "mommy" and "daddy", and the Hes "Jack" and "Casey."

213. Separating AMH from the Bakers would cause serious and enduring emotional and/or psychological harm to AMH.
214. AMH has been continuously nurtured, loved, cared for, provided for, educated and reared by the Bakers, since AMH was twenty-seven (27) days old, with every need being met to ensure AMH's proper upbringing.
215. AMH has been in good health and has thrived while in the Bakers' care.
216. Since February 23, 1999, AMH has been lovingly accepted by Mr. and Mrs. Baker, the four natural born children of the Bakers, the maternal and paternal grandparents, aunts, uncles, and cousins of the Bakers' natural born children, without distinction, the same as if AMH had been a natural born child of the Bakers.
217. AMH is in a strongly bonded, deep-seated, healthy relationship with the Baker family and extended family.
218. AMH does not have a strongly bonded relationship with Mr. and Mrs. He. The Hes had physical custody of AMH from February 8, 1999, to February 24, 1999, when the Hes gave custody to Mid-South, a total of sixteen (16) days out of AMH's five years. Beginning with the ninety-day foster care period, Mrs. He relinquished her parental responsibility of caring for and nurturing AMH to Mrs. Baker. Mrs. He also relinquished her parental responsibility of providing for, educating, and rearing AMH to the Bakers. During AMH's first few months

of life, when Mrs. He would visit with AMH and hold AMH in her arms, Mrs. He would give AMH back to Mrs. Baker each time AMH started to cry. During the first few years of AMH's life, Mr. He had very little contact at all with AMH. Mr. He would spend most of his time during the Hes' visits with AMH talking to Mr. Baker about other things. Mr. He relinquished his parental responsibility of caring for and nurturing AMH to the Bakers.

219. As AMH grew older, the Hes would use food to entice AMH to come to the Hes during their visits in the Bakers home.
220. A videotape of the September 23, 2003, session in Dr. Goldstein's office shows that AMH would continuously cling to Mrs. Baker when the Hes would attempt to get AMH to come to the Hes. The Bakers tried to encourage AMH to have interaction with the Hes, but AMH was very reluctant to approach the Hes. The Hes then used food to entice AMH to come to the Hes, but AMH would immediately return and cling to Mrs. Baker after AMH took the food from the Hes. After the Bakers left the room, AMH sat between the Hes on a sofa for a few moments before the session concluded. On the ride home from this session, Mrs. Baker reported that AMH did not want to return to Dr. Goldstein's office again, even though AMH had not voiced any reluctance to go to Dr. Goldstein's office before September 23, 2003.
221. AMH has a disproportionately stronger attachment to the Bakers than to the Hes because of prolonged inattention by the Hes to AMH.
222. The Bakers have performed all parental duties and responsibilities in relation to, and for, AMH, to AMH's benefit, faithfully and without exception, since February 23, 1999.

223. Since February 23, 1999, AMH has been in a well-integrated, safe, stable home provided by the Bakers.
224. In contrast, the Hes have not exhibited that they would be able to provide the same safe and stable home, as evidenced by, among other things, the lack of cleanliness of the Hes' apartment. For example, the Bakers gave the Hes a desk and a microwave cart. When Mr. Baker took these items to the Hes' apartment, he saw beer cans everywhere, a filthy kitchen, bones everywhere from food, and there was a foul smell in the apartment.
225. The Bakers are insuring that AMH is being properly educated and introduced to peers outside the Bakers' home under circumstances that are healthy and that contribute to AMH's well-adjusted development.
226. The Bakers have not taught AMH anything negative about the Hes, but have nurtured a positive attitude in AMH toward the Hes and, to the extent consistent with AMH's well-being, have permitted contact with AMH by the Hes.
227. The Bakers have demonstrated the ability to properly rear children through their care of AMH and their other natural born children.
228. AMH has flourished while in the Bakers' care. AMH's gross and fine motor skills are advanced relative to children her age. AMH is a curious, particular, and careful child, who has a fastidious manner. AMH thrives on organization and routine. AMH likes people and enjoys playing with friends, including AMH's Sunday School class and an organized group of Chinese friends.

229. The Bakers have acknowledged AMH's needs to be aware of AMH's Chinese heritage, and they have striven to educate AMH about that heritage. AMH is aware that AMH is Chinese, however, AMH identifies AMH as a member of the Baker family.
230. AMH shares a room in the Bakers' home with the Bakers' four-year-old biological child, and the two have a very close, almost inseparable, sibling relationship. AMH also has a close relationship with the other three Baker children.
231. The effect of a change of AMH's caretakers from the Bakers to the Hes is likely to have a harmful impact on AMH's emotional and psychological condition.
232. During the first five (5) years of AMH's life, AMH has developed a strong psychological and emotional attachment to the Bakers. Any harm to AMH from a transcultural placement or from terminating any further contact with the Hes, is substantially outweighed by the likely harm to AMH due to removal from caretakers with whom AMH has such a strong psychological and emotional attachment.
233. In contrast to the Bakers, the Hes have continually placed their needs and desires above those of AMH. Although the Hes have had financial means they have, at best, paid only token support. They have utilized their resources on themselves and allowed for the Bakers to provide for the care of their biological child. They have made both value and life-style choices that are inconsistent with caring, concerned, loving parents. It is obvious to the Court that the Hes want AMH when it is both beneficial and convenient for them, but not when it imposes any degree of hardship or inconvenience to them.
234. There is no credible proof in the record to determine the employment prospects or the living conditions that the Hes would have in the Peoples Republic of China.

235. There is a “one-child-per-family” policy in the Peoples Republic of China. Families with more than one child are subject to financial penalties and/or the loss of government services and benefits, including medical care and educational benefits.
236. If the Hes return to the Peoples Republic of China to live, they will be outside the jurisdiction of this Court.
237. Mr. He fears returning AMH to the Peoples Republic of China because the death rate for children of AMH’s gender is fifty (50%) percent in that country.
238. The evidence shows Mr. He to be a person of questionable character. By his own admission, he is dishonest. The evidence shows that he has acted in a manipulative manner, and that he has little hesitation to violate societal rules, regulations, laws, or court orders if he disagrees with them. Mr. He has demonstrated a pattern of conducting his affairs and his life by an end-justifies-the-means philosophy, and that Mr. He, alone, decides what ends justify what means. The evidence further shows that Mr. He has acted in an unstable manner in the past, and as a person whose future conduct, in relation to AMH, cannot be predicted.
239. The evidence shows Mrs. He to be a person of questionable character and unstable. The evidence shows that she is dishonest and manipulative, and that she has little hesitation to violate societal rules, regulations, laws, or court orders if she disagrees with them. Mrs. He has a history of acting in an unstable manner, as a person whose future conduct in relation to AMH is unpredictable, and that she has acted in a manner that facilitates and cooperates with Mr. He in his erratic, manipulative, and dishonest behavior.
240. Mrs. He has demonstrated a pattern of engaging in irrational and bizarre behaviors. Either

she is unable to control her irrational and erratic behavior, or she is able to control her behavior and she deliberately chooses to engage in such behavior for the purpose of manipulating others and getting her own way.

241. During the August 1, 2000, disturbance, Mrs. He was on the telephone with Mr. He, screaming at Mr. He that the Bakers were “bad people, demons.” Mrs. Baker called Mr. He later that evening to ask how Mrs. He was doing. Mr. He told Mrs. Baker that Mrs. He was fine, but that she had been very depressed, and that he felt Mrs. He might try to commit suicide.
242. On December 10, 2001, Mrs. He threatened the alleged victim of Mr. He’s assault in Criminal Court, and Judge Blackett admonished Mrs. He for her conduct.
243. In a hearing before the Court in February 2002, after the Court ordered Mrs. He to deliver AMH’s passport to the Court, Mrs. He refused the order, held her hands over her head, and said, “take me to jail, take me to jail.”
244. On or about December 1, 2003, Mr. and Mrs. He approached AMH at a Wal-Mart store, in direct violation of the Court’s order prohibiting contact between the Hes and AMH. Mrs. He assaulted the Bakers’ teenage daughter, Hope, in an attempt to forcibly take AMH from the care and custody of the Bakers’ teenage daughter and leave the Wal-Mart premises.
245. While Mrs. He was attempting forcibly to take AMH from the Bakers’ daughter, Mr. He falsely represented to a Wal-Mart supervisor that the Bakers’ daughter had forcibly taken AMH from the Hes, and that Mrs. He was merely attempting to regain custody of AMH from the Bakers’ daughter.
246. The Hes have demonstrated a pattern of falsely accusing persons who fail to act according

to the Hes' requests, demands, or desires. The Hes have shown a propensity to falsely accuse others of bias, prejudice, unethical conduct, or intentionally lying when others do not do what the Hes want them to do, say what the Hes want them to say, or when others say or do things that the Hes disagree with. The Hes also have shown a propensity to falsely accuse persons who oppose the Hes, or disagree with them in any way, of being part of a conspiracy to harm the Hes.

247. The Hes have falsely accused Ms. Mullins, Dr. Goldstein, Ms. Cloud, Ms. Chunn, Mid-South Christian Services, Kathryn Story, the Bakers, and counsel for the Bakers of having been involved in a conspiracy against the Hes to deprive them of regaining custody of AMH.
248. The questionable character and personality of both Mr. and Mrs. He poses a threat to AMH's well-being if AMH's custody is returned to the Hes.
249. When asked by Jeni DiPrizio, a television reporter, on February 7, 2002, whether Mr. and Mrs. He intended to deliver AMH's passport to the Clerk and Master, as ordered by the Court, Mr. He asked Ms. DiPrizio whether turning the passport in, or not, would make the best news story. This statement by Mr. He is one example of Mr. He's willingness to use any means, including manipulative publicity, to accomplish his goals, even when ordered by a court to refrain from doing so, rather than to act in AMH's best interests, by obeying court orders and pursuing his claims through the legal system.

VIII. CONCLUSIONS OF LAW

Although the Fourteenth Amendment of the United States Constitution, and Article One, Section Eight of the Tennessee Constitution grant biological parents constitutional rights which

must be guarded and protected, the same constitutional provisions grant minor children constitutional rights which must be guarded and protected. *Tennessee Code Annotated*

§ 36-1-101(d) also recognizes the rights of minor children:

In all cases, when the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child, which interests are hereby recognized as constitutionally protected and, to that end, this part shall be liberally construed.

A minor child has the right to be reared by parents who are not unfit, that is, parents who do not abandon the child by willfully failing to support or visit the child. A minor child of tender years has the right not to be removed from guardians with whom the minor child has developed a strong psychological and emotional attachment, when removal would cause substantial harm to the child. A minor child also has the right not to be removed from guardians who have provided a safe, stable, healthy, loving environment for the child for such a length of time that removal would cause substantial harm to the child. The Court must attempt to balance the constitutional rights of both the parents and the child when these rights are in conflict with each other.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no State shall “deprive any person of life, liberty, or property without due process of law.” More than 75 years ago the U.S. Supreme Court held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home, bring up children, and to control the education of their own.”⁶ “The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children.”⁷

⁶*Meyer, supra*, at 399, 401.

⁷*Troxel v. Granville*, 530 U.S. 57, 66 (2000).

While this Court recognizes this significant parental liberty interest, this interest is not without limit. Parents' rights with respect to their children have never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family.⁸ These limitations have arisen, not simply out of the definition of parenthood itself, but because of, among other reasons, the child's own interest in preserving relationships that serve the child's welfare and protection.⁹ Minor children, as well as adults, are protected by the U.S. Constitution and possess constitutional rights.¹⁰

The United States Supreme Court, on numerous occasions, has acknowledged that children have constitutionally protected rights and liberties in many circumstances.¹¹ To suggest otherwise would be to suggest that, when it comes to parental rights, children are "so much chattel".¹² "The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child."¹³

This is not to suggest that a child's liberty interest in maintaining contact with a particular individual is to be treated invariably as on a par with that child's parents' contrary interests.

⁸*Troxel, supra*, at 88.

⁹*Id.*, citing *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

¹⁰*Id.*, at 88-89, citing *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

¹¹*Id.*, see *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (liberty interest in avoiding involuntary confinement); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority"); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506-507 (1969) (First Amendment right to political speech); and *In Re Gault*, 387 U.S. 1, 13 (1967) (due process rights in criminal proceedings).

¹²*Id.*, at 89.

¹³*Id.*

Substantive due process case law requires the Court to acknowledge the strong legal presumption that parents will act in their child's best interest.¹⁴ Absent a finding that the parents are unfit, such as when the parents willfully abandon the child, the law presumes that parental rights should not be terminated.¹⁵ Notwithstanding this strong legal presumption, it is the opinion of this Court that there may be circumstances in which a child has a stronger interest at stake than merely the protection from harm caused by the termination of parental rights. This Court must consider the impact on AMH of arbitrary parental decisions that neither serve nor are motivated by AMH's best interest.

A. General Conclusions of Law

250. The Court concludes that it has subject matter and personal jurisdiction to adjudicate the issue of whether Mr. and Mrs. Hes' parental rights should be terminated.
251. The Court concludes that it has subject matter and personal jurisdiction to adjudicate the issue of whether the June 4, 1999, Juvenile Court Consent Order Awarding Custody of AMH should be modified.
252. The Court concludes, by clear and convincing evidence, that the June 4, 1999, Consent Order Awarding Custody, entered by the Juvenile Court of Memphis and Shelby County, Tennessee, is a valid order of a court of competent jurisdiction and has the force and effect of appointing the Bakers as legal custodians and guardians of AMH.
253. The Court concludes, by clear and convincing evidence, that the June 4, 1999, Consent Order Awarding Custody, entered by the Juvenile Court of Memphis and Shelby County,

¹⁴*Id.*, at 89-90.

¹⁵See Tenn. Code Ann. § 36-1-113

Tennessee, is not facially invalid or defective.

254. The Court concludes that the Hes and the Bakers knowingly and voluntarily signed the June 4, 1999, Consent Order Awarding Custody in the Juvenile Court of Memphis and Shelby, County, Tennessee.
255. The Court concludes, by clear and convincing evidence, that by virtue of the June 4, 1999, Consent Order Awarding Custody, the Bakers were appointed, and have remained, the legal custodians and guardians of AMH.
256. The Court concludes, by clear and convincing evidence, that Mr. and Mrs. He waived any right to modify, amend, set aside, or dismiss the June 4, 1999, Consent Order Awarding Custody and making the Bakers AMH's guardians by:
- (1) by failing to timely file an appeal of said order;
 - (2) by filing the May 3, 2000, Petition to Modify custody in the Juvenile Court, without challenging the validity of the Consent Order Awarding Custody;
 - (3) by failing to timely file an appeal of the denial of the May 3, 2000, Petition to Modify custody; and
 - (4) by filing the May 29, 2001, Petition to Modify custody without challenging the validity of the Consent Order Awarding Custody.
257. The Court concludes that Mr. Weaver explained to the Bakers and Mr. He that custody means the actual physical care of the child and includes the right and responsibility to provide for the physical, moral and emotional well-being of the child. The Court concludes that Mr. Weaver explained the legal ramifications involved with modifying a temporary custody order, and that there existed a possibility that custody of AMH might not be returned to the Hes. The Court concludes that Mr. He was made fully aware of the legal

consequences of agreeing to give the Bakers temporary custody of AMH and the legal requirements of regaining custody later.

258. The Court concludes that Mrs. He waived any right she may have had to be advised by an attorney before she filed the Petition for Custody and signed the Consent Order Awarding Custody in the Juvenile Court for Memphis and Shelby County, Tennessee, by relying on Mr. He to explain the things that attorney Kevin Weaver had told Mr. He at the June 2, 1999, meeting.
259. The Court concludes that neither Mr. or Mrs. He were deprived of their constitutional right of due process.
260. Ordinarily court orders involving the custody of minor children are subject to modification, at any time, based upon a material change in circumstances. However, in this cause, the Hes filed a Motion Pursuant to T.R.C.P. Rule 60.02 to Set Aside Consent Order Awarding Custody Entered June 4, 1999. In that motion the Hes requested this Court to set aside or dismiss the June 4, 1999, Consent Order Awarding Custody on the ground that the Consent Order is void. The Hes claim that the Consent Order is void because Mrs. He was not fully advised of her legal rights before she signed the Consent Order. The Court concludes that the Hes are barred by the doctrines of *res judicata*, collateral estoppel, and laches from seeking to set aside or dismiss the June 4, 1999, Consent Order Awarding Custody and making the Bakers' AMH's guardians. *Res judicata* is the rule that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a

subsequent action involving the same claim, demand or cause of action.¹⁶ Collateral estoppel is the rule that when an issue of ultimate fact has been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation.¹⁷ The doctrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. Laches is the neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done.¹⁸

261. The Court concludes that there is no legal distinction between legal custody and guardianship for the purposes of deciding the issues in this cause. The Consent Order Awarding Custody entered by the Juvenile Court on June 4, 1999, awarded the custody and “guardianship of the person” of AMH to the Bakers. *Tennessee Code Annotated* § 37-1-102 defines custody as, “the control of actual physical care of the child and includes the right and responsibility to provide for the physical, mental, moral and emotional well-being of the child.” This statute also provides that “custody” relates to those rights and responsibilities that are exercised by the parents.
262. Regarding the definition of “guardian,” *Tennessee Code Annotated* § 37-1-102 provides that, “‘Guardian’ means, for purposes of adoptions and terminations of parental rights, the meaning set forth in (*Tennessee Code Annotated*) § 36-1-102, and for all other purposes (emphasis added), the meaning set forth in (*Tennessee Code Annotated*) § 34-1-101.”

¹⁶*Black’s Law Dictionary* (West, 1983), at 678.

¹⁷*Id.*, at 136.

¹⁸*Id.*, at 453.

Tennessee Code Annotated § 34-1-101 defines guardian as, “a person or persons appointed by the court to provide partial or full supervision, protection and assistance or the person or property or both of a minor.” While this matter is now before the Court on a Petition For Adoption and to Terminate Parental Rights, at the time of entry of the Consent Order Awarding Custody in Juvenile Court, it only involved custody, and not adoption or termination of parental rights.

263. The Court concludes that all proceedings concerning AMH’s custody, pending in Juvenile Court on June 20, 2001, were transferred to this Court to be adjudicated pursuant to *Tennessee Code Annotated* § 36-1-116(f)(1).
264. The Court concludes that in order to terminate the parental rights of either Mr. or Mrs. He, the ground for termination must be a ground set forth in *Tennessee Code Annotated* § 36-1-113 and must be established by clear and convincing evidence as to each such ground.
265. The Court concludes that the Court must also determine by clear and convincing evidence whether termination of the Hes’ parental rights is in AMH’s best interest.
266. The Court concludes that Tennessee law does not permit parents to repent from, or rectify, an act or omission that, before the date the petition to terminate parental rights was filed, constituted a ground for termination.¹⁹
267. The Court concludes that the parents of a minor child cannot be excused from willfully failing to make child support payments by entering into a private agreement with other persons who agree to, and who in fact, financially support the said minor child.
268. The Court concludes that Mr. and Mrs. He had a duty to support AMH pursuant to

¹⁹*Tenn. Code Ann. § 36-1-102(1)(F) In Re D.L.B.*, 2002 Tenn. App. LEXIS 575 (August 6, 2002).

Tennessee Code Annotated § 34-1-102.

B. Conclusions of Law on Parental Termination Grounds

269. *Tennessee Code Annotated* § 36-1-113(g)(1): The Court concludes, by clear and convincing evidence, that Mr. He knowingly and willfully abandoned AMH, by knowingly and willfully failing to provide any child support for AMH and by knowingly and willfully failing to visit AMH for four (4) consecutive months immediately preceding the filing of the June 20, 2001, Petition to Adopt and to Terminate Parental Rights.
270. *Tennessee Code Annotated* § 36-1-113(g)(1): The Court concludes, by clear and convincing evidence, that Mrs. He knowingly and willfully abandoned AMH, by knowingly and willfully failing to provide any child support for AMH and by knowingly and willfully failing to visit AMH for four (4) consecutive months immediately preceding the filing of the June 20, 2001, Petition to Adopt and to Terminate Parental Rights.
271. The Court concludes that the Hes' willful failure to support AMH is not excused because there was no court order requiring support,²⁰ nor because the Bakers did not request support for AMH from the Hes.²¹
272. *Tennessee Code Annotated* § 36-1-113(g)(9(A)(ii), (iii), (iv), (v), and (vi): The Court concludes, by clear and convincing evidence that, at the time of the filing of the Petition to Terminate Parental Rights, Shaio-Qiang (Jack) He, was not the legal parent or guardian of AMH. The Court further concludes, by clear and convincing evidence, that Shaio-Qiang (Jack) He's parental rights should be terminated because:

²⁰*State v. Mainer*, 1997 Tenn. App. LEXIS 755 (October 31, 1997), *perm. app. denied*, (October 31, 1997).

²¹*Bryant v. Bryant*, 1999 Tenn. App. LEXIS 72 (February 1, 1999); *In Re Satterwhite*, 2001 Tenn. App. LEXIS 257 (April 17, 2001).

(1) Mr. He has failed, without good cause or excuse, to make reasonable and consistent payments for the support of AMH in accordance with his ability to pay;

(2) Mr. He has engaged in only token visitation with AMH;

(3) Mr. He has failed to manifest an ability and willingness to assume legal and physical custody of AMH; and

(4) Placing custody of AMH in Mr. He's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

273. *Tennessee Code Annotated Tennessee Code Annotated* § 36-1-113(g)(8)(B)(i) and (ii):

The Court concludes that the evidence fails to establish, by clear and convincing evidence, that Mrs. He's mental condition is presently so impaired and is likely to remain so that it is unlikely that Mrs. He will be able to assume or resume the care of and responsibility for AMH in the near future.

274. *Tennessee Code Annotated* § 36-1-113(g)(8)(B)(i) and(ii): The Court concludes that the

evidence fails to establish, by clear and convincing evidence, that Mr. He's mental condition is presently so impaired and is likely to remain so that it is unlikely that Mr. He will be able to assume or resume the care of and responsibility for AMH in the near future.

275. *Tennessee Code Annotated* § 36-1-113(g)(3)(A)(i), (ii) and (iii): The Court concludes that

the provisions of this section of the statute are inapplicable to this cause because AMH was not removed from Mr. He's custody by State action, rather Mr. He voluntarily relinquished custody and guardianship of AMH through a consent order awarding custody.

276. *Tennessee Code Annotated* § 36-1-113(g)(3)(A)(i), (ii) and (iii): The Court concludes that

the provisions of this section of the statute are inapplicable to this cause because AMH was not removed from Mrs. He's custody by State action, rather Mrs. He voluntarily relinquished

custody and guardianship of AMH through a consent order awarding custody.

C. Conclusions of Law on AMH's Best Interests

277. The Court concludes, by clear and convincing evidence, that AMH is a minor child of tender years, who has developed a strong psychological and emotional attachment to the Bakers, and that removal of AMH from the Bakers would cause substantial harm to AMH.
278. The Court concludes, by clear and convincing evidence, that the Bakers have provided AMH a safe, stable, healthy, loving environment for such a length of time that removal of AMH from that environment would cause substantial harm to AMH.
279. The Court concludes, by clear and convincing evidence, that continuation of any parent-child relationship between AMH and either Mr. or Mrs. He greatly diminishes AMH's chances of early integration into a safe, stable, and permanent home.
280. The Court concludes that the risks inherent in removing AMH from AMH's present circumstances substantially outweigh any risks posed by transcultural placement and loss of contact with AMH's biological parents, the Hes.
281. The Court concludes, by clear and convincing evidence, that there is parental misconduct or inability to parent by the Hes.
282. The Court concludes, by clear and convincing evidence, that both Mr. and Mrs. He are unfit parents, based on abandonment of AMH by both Mr. and Mrs. He.
283. The Court concludes, by clear and convincing evidence, that it is in AMH's best interest to terminate the parental rights of both Mr. and Mrs. He.
284. Applying the factors in *Tennessee Code Annotated* § 36-1-113(i)(1-9) for determining whether termination of parental rights is in the best interest of the minor child, the Court

concludes, by clear and convincing evidence, that termination of the Hes' parental rights is in the best interest of AMH because:

- (1) the Hes have failed to make such an adjustment of circumstance, conduct, and conditions as to make it safe and in AMH's best interest to be in the Hes' home;
- (2) the Hes have failed to maintain regular, meaningful visitation and contact with AMH;
- (3) the Hes have failed to establish a meaningful relationship with AMH due to the Hes neglect and inattentiveness;
- (4) the effect of a change of caretakers and physical environment will have a negative and detrimental impact on AMH's emotional and psychological well-being;
- (5) the physical environment of the Hes' home is unhealthy and unsafe;
- (6) Mrs. Hes' emotional instability would be detrimental to AMH; and
- (7) the Hes' have failed to provide anything more than token support for AMH, despite the Hes' ability to pay such support.

Based on all of the foregoing findings of fact and conclusions of law the Court finds that the petition to terminate the parental rights of Shaio-Qiang (Jack) He and Qin (Casey) Luo (He) is well taken and should be granted.

The Court finds that the petition to modify custody filed by Qin Luo (He) in the Juvenile Court for Memphis and Shelby County, Tennessee on May 29, 2001, is not well taken and should be denied and dismissed.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Petition to Terminate Parental Rights be, and the same is hereby, GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the parental rights of Shaio-Qiang He and Qin Luo (He) be, and the same are hereby, TERMINATED.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Petition to Modify custody be, and the same is hereby, DENIED and DISMISSED.

The Court finds that there is no just reason for delaying the entry of this judgment. This judgment is made a final judgment, pursuant to T.R.C.P. Rule 54.02. The Court will hold the Petition For Adoption in abeyance until the Court's decision on the Petition to Terminate Parental Rights and the Petition to Modify are final.

Chancellor by Designation

Date

CERTIFICATE OF SERVICE

This is to certify that the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW was served upon counsel for the parties by placing a true and exact copy in the United States mail, postage prepaid, addressed to: Larry Parrish, Attorney at Law, (address), David A. Siegel, Attorney at Law, 5100 Poplar Avenue, Suite 2500, Memphis, Tennessee 38137, Richard A. Gordon, Attorney at Law, 264 Barry Road, Memphis, Tennessee 38117, Kimbrough Mullins, Attorney at Law, 50 North Front Street, Suite 1075 Memphis, Tennessee 38103, and Linda Holmes, Attorney at Law, 142 N. Third Street., 3rd Floor, Memphis, Tennessee 38103, on this the 12th day of May, 2004.

Deputy Clerk